Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioners,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Must a court of appeals consider the entire record when determining whether the trial court's findings are clearly erroneous, or may the appellate court instead forego review when the lower court's findings are supported by the testimony of the prevailing party's expert witness?

II. Does the requirement in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), that a plaintiff in a disparate-impact case under Title VII of the Civil Rights Act of 1964 identify the practice causing the disparate impact impose such a heavy burden that plaintiffs who have made the greatest showing possible nonetheless fail to meet the burden?

III. May otherwise proper statistical proof of racial disparities in hiring, promotions, and upgrades be overcome by speculation unsupported in the record, by unsupported presumptions of prior discrimination against whites, by the employer's manipulation of inappropriate standards of availability of blacks for the positions in question, and by the employer's carving of the statistical analysis into chunks of data so small that it becomes difficult for a test of statistical significance to be able to rule out chance as the cause of the observed disparities even if intentional discrimination had occurred?

Petitioners:

Daniel Anderson, Jr.
Poitier Anderson
Mose Emanuel Bailey
Moses Coleman
Linda Diane Sharp Davis
Richard Grant, Jr.
Earnest Hall
Tommy Hardy
Chris Spring Harris
Synovia Ann Jackson
Lonnie Darril Jennings
James Henry Lewis
Robert Melvin
Micheal Chiffon O'Neal
Bobbie Jean Sharp
Alexander Smith
Catherine Spells
Gregory Townsend
Kimroy Williams

and the classes they represent, which were certified and defined in the Order of January 30, 1987 and in the Opinion of August 12, 1988. The Order of January 30, 1987, certified and defined the classes as follows:

> On the count arising under 42 U.S.C. § 1981, the class shall consist of (1) all present and former black employees of the defendant Douglas & Lomason Company at its Cleveland, Mississippi, plant who have been employed by the defendant at any time since October 1, 1982, but excluding any black employees currently employed in office clerical or supervisory positions, and (2) all black individuals who have completed and submitted applications for employment at this plant since October 1, 1982, and were denied employment. On the count arising under Title VII of the Civil

> Rights Act of 1964, as amended, (1) all present and former black employees of the defendant Douglas & Lomason Company at its Cleveland, Mississippi, plant who have been employed by the defendant at any time on or after April 20, 1984, but excluding any black employees currently employed in office clerical or supervisory positions, and (2) all black individuals who have completed and submitted applications for employment at this plant on or after April 20, 1984.

The Opinion of August 12, 1988 additionally certified and defined the following subclasses:

> (a) On the count arising under 42 U.S.C. § 1981, a class of all black persons who have, at any time between October 1, 1982 and January 17, 1985, unsuccessfully sought to obtain application forms for employment with Douglas & Lomason, either directly or through persons then employed by the company, whether or not such members of the subclass have received an application form at any other time inside or outside the period; and
>
> (b) On the count arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, a class all black persons who have, at any time between April 20, 1984 and January 17, 1985, unsuccessfully sought to obtain application forms for employment with Douglas & Lomason, either directly or through persons then employed by the company, whether or not such members of the subclass have received an application form at any other time inside or outside this period.

Respondents:

Douglas & Lomason Co., Inc.

Aluminum, Brick & Glass Workers International Union (Rule 19, F.R.Civ.P., defendant below)

Local Union No. 212 of the Aluminum, Brick & Glass Workers International Union (Rule 19, F.R.Civ.P., defendant below)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioner,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Daniel Anderson, Jr., *et al.*, respectfully pray that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals entered on June 23, 1994, corrected on July 28, 1994, and revised on September 9, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Daniel Anderson, Jr., et al. v. Douglas & Lomason Co., Inc., et al.*, 26 F.3d 1277 (5th Cir. 1994). The corrected decision of the Court of

Appeals issued on July 28, 1994 is set forth at App. 1a. The original decision of the Court of Appeals issued on June 23, 1994 is set forth at App. 82a. The findings of fact and conclusions of law entered by the district court on July 21, 1992 have not been officially reported, and are set forth at 164a. The judgment of the district court is set forth at 287a. The letters of determination issued by the United States Equal Employment Opportunity Commission to the petitioners are set forth at 289a.[1] The Order of the Court of Appeals denying petitioners' petitions for panel rehearing and rehearing *en banc,* and revising the July 28, 1994 corrected opinion of the Court of Appeals, is set forth at App. 319a.

JURISDICTION

The Court of Appeals denied petitioners' petition for rehearing on September 9, 1994. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c), and Rule 13.4 of the Rules of this Court.

STATUTES INVOLVED

This case involves §§ 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and -3(a), and 42 U.S.C. § 1981. These sections provide as follows:

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[1] The letter of determination for Thomas Hardy is not contained in the Joint Exhibit which is supposed to contain it, and is therefore not included in the Appendix. It does not differ in any significant respect from those which are contained in the Appendix.

Sec. 703(a). Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 704(a). Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were at the time the Complaint was filed unsuccessful black applicants for employment, and present and former black employees, at the Douglas & Lomason Co. plant in Cleveland, Mississippi. They filed their EEOC charges on October 17, 1984 and later, and filed this class action against the respondent company on July 5, 1985. The local and international union respondents were later added as Rule 19, F.R.Civ.P., defendants.

The respondent company manufactured automotive trim as a supplier for automobile manufacturers at a plant in Cleveland, Mississippi, in the heart of the Delta. Petitioners' hiring claims involve the unskilled entry-level "production" or "general factory" job category at the plant; applicants "need only meet certain minimal requirements, such as being at least eighteen years of age, physically able to perform the work, and able to read and write." 2a, 13a. Numerous whites were hired without any factory experience. PX-152. The various functions in the job category were unskilled and very simple. The only training for new hires is what they picked up by doing the job. Tr. 59-67.

Petitioners raised two class claims of hiring discrimination for this unskilled production job. *First,* petitioners complained that the company's restrictions on access to application forms between April 13, 1983 and January 14, 1985, disproportionately prevented blacks from obtaining application forms at times when the company was hiring, and thus prevented them from applying and being considered for hire. Pretrial Order at 8, R. 2585. This was both a disparate-impact claim and a disparate-treatment claim.[2] *Second,* petitioners complained of discrimination against those black applicants who managed to obtain application forms, from October 1, 1982 through 1985. Pretrial Order at 8, R. 2585. All of petitioners' claims of discrimination are focused on the period beginning October 1, 1982, when a new Plant Manager, James Grizzard, arrived, and generally end either at the end of 1985 (hiring) or when suit was filed (promotions and upgrades).[3]

While the respondent company disputed the relevance of petitioners' expert evidence, it did not dispute the statistical accuracy of this evidence. Both sides agreed that the period from January 1, 1978 to September 30, 1982 was the relevant timeframe for

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[2] Petitioners have never complained that applicants had to fill out application forms at the plant, contrary to the opinion below at 2a-3a and 9a, but complained that would-be applicants were not allowed to fill out application forms even when the company was hiring, a practice the panel regarded as common. App. at 11a-12a. The panel did not address the actual disparate-impact claim. Dissent, App. at 54a-57a and 71a.

[3] Petitioners also complained of racial discrimination in promotions to Leader and Foreman positions in production, in temporary upgrades to two Maintenance positions, in the filling of a permanent Rack Maintenance position, and of retaliation in enforcing the company's anti-garnishment rule.

historical analysis, but there was virtually no hiring between late 1980 and September 30, 1982. Both sides agreed, for example, that in the 1980 Census blacks were 51.9% of the civilian labor force, 58.2% of the manufacturing labor force, and 60.7% of the blue-collar workforce. DX-127. Blacks were 70.1% of employed operators, laborers, and fabricators in Bolivar County, excluding the respondent's employees. PX-62-A. There was likewise no dispute that 65.0% of the most work-interested job-seekers at the Mississippi State Employment Service were black. PX-56, 62-A; dissent below at 62a n.8 and 64a-66a. In point of fact, there was no dispute that every measure external to the company showed that blacks were the majority of those available for unskilled, entry-level factory work. The court of appeals refused to consider any of this evidence, stating:

> Because we agree with the district court that actual applicant flow was the best measure of D & L's performance, we need not address whether the district court erred in failing to follow the seven standards offered by the plaintiffs to define the labor pool available to D & L. The district court rejected each standard as being flawed.

App. at 15a n.14. The lower court also admitted that it did not consider the process of determining whether a trial court's findings were "clearly erroneous" to require the examination of any finding supported by expert testimony, even where the appellants had presented extensive expert analysis of their own:

> The district court found Dr. Haworth's analysis to be more credible and more persuasive than the seven analyses offered by the plaintiffs' expert. "We do not have

> the statistical expertise to declare a particular statistical technique inappropriate where a qualified expert expresses a contrary view and the district court credits the testimony." *Id.; see also Trevino,* 811 F.2d at 904 (holding that the district court did not err in crediting the defendant's statistical evidence over contrary evidence); *Nash,* 800 F.2d at 497 (noting that we must affirm the district court's finding where there are two permissible views of the evidence). Thus, we find that the district court did not err in crediting D & L's statistical analysis, which demonstrated that D & L did not engage in discriminatory hiring practices, over the analyses offered by the plaintiffs.

App. at 19a (footnote omitted). In response to petitioners' petition below for panel rehearing and suggestion for rehearing *en banc,* the panel struck part of the language admitting that it had upheld the trial court's findings without considering the bulk of plaintiffs' proof. App. at 319a. The panel did not go back and consider any of the evidence it had ignored, and did not strike all of the language stating that appellate courts should not review findings supported by the winning side's expert testimony considered in isolation from all other evidence.

Both sides agreed that the proportion of the company's employees who were black as of any given date was higher than their availability, because whites hired into these jobs left voluntarily much more frequently than blacks, and white employees were involuntarily terminated much more frequently than blacks. DX-138, PX-195. The court of appeals treated this neutral fact as evidence of non-discrimination in hiring, App. 13a-14a, although a high proportion of the workforce in the years at issue

were simply holdovers from earlier hiring--90% in 1982, 75% in 1983, 60% in 1984, and 58% in 1985--and although the representation of blacks went down over the years in question.

Both sides agreed that blacks were 64.6% of the hires from January 1978 through 1980, and 46.5% of the hires from Oct. 1, 1982 through 1985. The company offered no non-racial explanation for the disparity, other than to suggest that it might be explained by Personnel Manager Haynes' refusal to provide application forms to all persons seeking jobs at times when the company was hiring. The trial court found that this was in fact a reason for the disparity and admitted that petitioners could not possibly have made a more specific showing, App. at 179a-180a, but held that this Court's decision in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), required a more specific showing as a condition of mounting a disparate-impact challenge to an employment practice. App. at 270a-276a. The court of appeals agreed, App. at 8a-9a, but the dissent disagreed. App. at 53a-57a.

The majority below held correctly that Personnel Manager Haynes limited the number of applications she took when the company was hiring, because she only wanted to consider a limited number of people. "Thus, it was possible for individuals to be told that D&L was not taking applications both when the Company was and was not hiring." App. at 3a-4a. As the dissent pointed out, petitioners established that more than 50 black job-seekers had been denied applications at times when the company was hiring, and the company was not able to identify a single white job-seeker denied an application at a time when the company was hiring. App. at 55a-57a. Many of these attempted applicants testified at trial or by deposition, and pinned down the periods of time when this occurred by taking the names of relatives and friends

of either race who had told the witnesses they had been hired, leading the witnesses to try to apply, and looking up the hire dates of those relatives and friends on a list of hires petitioners had obtained in discovery.[4] Some of these witnesses saw whites obtaining applications and being hired at the same time blacks were being turned away. App. at 56a. Many of these witnesses tried again and again to get applications, but never hit the fortuitous, precisely right time to get an application, and became discouraged. The panel majority approved the trial court's rejection of this voluminous testimony on the ground that the witnesses were discredited, in that other blacks had managed to obtain applications, the company had provided a legitimate, nondiscriminatory reason for its refusal to make applications available, and plaintiffs had failed to produce a smoking gun showing that race was the true reason for the inability of these attempted applicants to get application forms. App. at 41a-42a.

The court of appeals then upheld the trial court's decision that the true measure of black availability for these unskilled, entry-level jobs was the racial composition of the persons who got application forms between April 1984 and January 1985, while refusing to consider peti-

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[4] As the dissent points out, the company did not object to the admission of this evidence for the purpose of pinning down the periods of time when the witnesses were trying to obtain application forms. The trial court regarded it as sinister, and as undermining the credibility of the black attempted applicants who testified in person or by deposition, that each of these witnesses called by plaintiffs could pin down at least one unsuccessful effort to obtain an application to a time when the company was hiring. App. at 218a-219a. There would, of course, have been no professionally legitimate purpose in proffering the testimony of others who could not pin down the timing of their efforts in some credible fashion. A rule that the relevance of testimony is alone enough to make it suspect is unknown outside the field of civil rights litigation.

tioners' evidence to the contrary. App. at 15a-16a. Dr. Haworth, the company's expert, variously calculated this figure as 45.5% black or 46.7% black. DX-123 through DX-126. These figures are substantially below all external measures of the availability of blacks, and Dr. Haworth agreed that her figures assume blacks in this part of the Mississippi Delta are *less* available for jobs at the *bottom* of the job ladder than they are for jobs at the *top,* a situation which is the reverse of what both sides' experts testified is actually the case: that civilian labor-force statistics not differentiating among kinds of jobs will underestimate the availability of blacks for low-end jobs like the job at issue here and overestimate the availability of blacks for high-end jobs. Tr. 1886-87 (Dr. Haworth); Tr. 2029-30 (Dr. Mann). The dissent below explained in detail why Dr. Haworth's figures were "out of touch" with reality. App. at 70a-71a n.20.

Two additional problems in the use of such applicant-flow statistics deserve mention. *First,* petitioners introduced substantial evidence that the application forms were not complete for the period of time from April 1984 through the notice of the EEOC charges on October 17, 1984. Personnel Manager Haynes told a markedly different story every time she was under oath. In her March 9, 1987 deposition, she testified that she kept applications for a year if the applicant was aged 55 or older, and that she had been specifically instructed to keep for six months the applications of persons under age 55. (PX-90, Dep.Tr. 17). At the trial, she testified oddly that all applications were good for a year but she did not keep any of them for more than six months. (Tr. 466-67, R.Vol. 17). When she was confronted, she stated "I really don't know other than I just don't remember keeping any applications longer tha[n] six months, of anyone." (Tr. 467-68, *id.*). In 1987, she had also testified that she was not sure which applications she had retained, and that she

may have thrown out some applications before October 1984. (PX-90, Dep.Tr. 25). She was clear that she made a deliberate effort to keep application forms after mid-October 1984 when she received notice of classwide EEOC charges, and that until this time she had routinely discarded applications, but not about anything else. Tr. 514-15, R.Vol. 17. The defendant's expert testified grudgingly at trial, after being confronted with her own deposition testimony given the preceding month, that Ms. Haynes had told her that during some period of time Ms. Haynes kept the applications Ms. Haynes thought were worth future consideration and threw away the others. Tr. 1905-06, R.Vol. 22. Plaintiffs introduced uncontradicted statistical evidence tending to confirm this and to show that the applications of blacks between April and mid-October were disproportionately thrown away. The trial court had found that Ms. Haynes consistently took 12-15 applications to fill 7 positions. App. at 168a. This is consistent with data for the surviving application forms for the period from October 17, 1984 through January 1985: 39% of the surviving forms are for persons never hired. It is *not* consistent with undisputed data for the surviving application forms for the period from April 1984 through October 16, 1984: only 22.4% of the surviving application forms were filed by person who were not hired. PX-190. This suggests that a substantial number of forms were discarded.[5] There is also a huge racial

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[5] The company had no explanation at trial, but after the trial suggested that an applicant could have applied in the first period and been hired in the second period. It provided no data or revised calculation. Petitioners then gave the trial court the results of a re-calculation from the evidence of record in which applicants were counted as hires in the same period as that in which

(continued...)

difference in the composition of the surviving applications between the two periods. Of the applications surviving from April 1984 through October 16, 1984, it is undisputed that only 37.6% were filed by blacks, and it is undisputed that for the applications filed between October 17, 1984 and January 1985, 60.4% were filed by blacks.[6] PX-189. The latter figure is lower than most of the external measures of the availability of blacks for these jobs, but the district court stated that the percentage of applications filed by blacks was higher in October 1984 because:

> ... it was during this period of time that the activity spearheaded by Oliver Robinson to enlist other black residents of the community to sign and file EEOC charges was well underway, and may very well have had an impact upon the variance and percentage of black applicants in that applicant pool, as

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[5](...continued)
they applied. It showed an even larger disparity: from April 1984 to October 16, 1984, 22.4% of the surviving application forms were filed by unhired applicants; from October 17, 1984 through January 1985, 44.1% were filed by unhired applicants. The district court ignored this information, and speculated -- directly contrary to this evidence -- that the shortage of unhired applicants before October 1984 was because they were hired later. Opinion at 65, R.E. 87.

[6] The company suggested in its post-trial submission that PX-189 was incorrect for the same reason as PX-190. Plaintiffs then gave the district court the results of a re-calculation similar to that described in the preceding note. It showed virtually identical results: from April 1984 to October 16, 1984, 37.6% of the surviving application forms were filed by blacks; in the period from October 17, 1984 through January 1985, 60.2% were filed by blacks.

compared with pools before and after it.

App. at 175a. There is no evidence in the record that Mr. Robinson[7] ever urged anyone to apply for a job with the company, or that any filing of EEOC charges by anyone ever led anyone to file or file an application. There is no such testimony in any of the many depositions taken in this case, and no such evidence was adduced at trial. Notwithstanding the trial court's undeniably speculative locution -- "may very well have had" -- the court of appeals stated that the trial court had made an actual finding to this effect, and upheld it as not clearly erroneous. App. at 17a; dissent at 61a-62a.

Petitioners' statistician, Dr. Mann, concluded as a statistical matter that the surviving applications for the period from April 1, 1984 through October 16, 1984 came from a "different population" than the surviving applications for the period from October 17, 1984 through January 1985. The differences are too large for these sets to be coming from the same population. Such differences could be seen by chance only a few times in a thousand cases. Tr. 2032-33, R.Vol. 18. Again, the company did not dispute this evidence.

Second, laying aside the question of what Dr. Haworth had to work with by way of retained applications, there are enormous question about what she *did*

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[7] The record shows that Mr. Robinson had been diagnosed by his therapist as suffering from paranoid schizophrenia, that this condition did not interfere with the high quality of his work as a Quality Control Inspector with the company, that after he was assaulted within the plant by a white supervisor, Tom Garner, he was unable to continue working, and that the company gave Mr. Garner a one-week paid suspension and required him to use a week of vacation so that he would be gone for another week.

with what she had. She made numerous changes to the data, excluding from her analysis groups of applications which were predominantly black, including in her analysis an application filed by a white for a *different* job, and excluding predominantly-black applicants in October and November 1984. Dissent, App. at 60a n.7. In addition, Dr. Haworth admitted on cross-examination that she divided applicants into "pools" and counted some applicants -- disproportionately white -- in two pools rather than one; she excluded applicants who were disproportionately black from some pools; and she excluded applicants who had been referred by MSES in 1985 although she included the hires made from those referrals, with the effect that the percentage of applicants who were black was decreased and the percentage of hires who were black was increased. Tr. 1831-57. Removing these thumbs from the scale increases black availability to 54.4% of the applicants allowed to fill out forms. PX-188-A.

The trial court ignored these problems and accepted Dr. Haworth's analysis as the best measure of the availability of blacks for unskilled, entry-level factory work. App. at 173a-174a, 278a. The majority below affirmed, without considering petitioners' alternative analyses. App. at 15a-20a.

Dr. Haworth then divided the company's hiring into segments, applied her availability figure to the company's hiring in each separate segment and concluded there was no hiring discrimination unless she found a statistically significant shortfall for that segment standing alone. In virtually all segments, the company hired fewer blacks than even her standard would suggest. Even with her very low standard of black availability, she found a statistically significant shortfall in the hiring of blacks (3.89 standard deviations). DX-119.

The experts for both sides agreed that, as sample sizes decrease, it is more difficult for a test of statistical significance to detect a non-random difference in hiring rates. The sample sizes in each hiring segment on DX-119 were small -- 14, 27, 32, 38, 51 and 27 hires -- and only the October 8-November 2, 1984 segment (with the largest sample size) produced a finding of statistically significant results when examined in isolation from the larger picture. Dr. Haworth then discarded this finding, excluded the applicants for the October-November period from her analysis, and found that there was no statistically significant shortfall. *Id.* She claimed that she had excluded them because these applicants disproportionately had manufacturing experience or blue-collar experience, but never compared them with applicants from other periods of time to see if there was a non-random difference, and then admitted on cross-examination that she did not know the experience of these applicants, but had merely made assumptions based on the names of their employers. Tr. 1744, 1963-64. The panel majority approved the explanation Dr. Haworth gave on direct examination, without ever addressing what she admitted on cross-examination. App. at 16a-17a n.15. *And see* the dissent, App. at 60a-62a n.7. On DX-123 and DX-125, she used even smaller hiring segments, with sample sizes as low as 5 hires.

From May 31, 1985 to September 20, 1985, the last period of hiring challenged by petitioners, the company considered for hiring only the applicants who were referred by the Mississippi State Employment Service. The company hired 84.4% of white applicants referred by MSES, compared with 50.8% of black applicants so referred. PX-46-A. This difference was statistically significant (2.7 standard deviations). Three of the six MSES job orders in 1985 involved "OJT" referrals -- persons who were supposedly harder to place and whose

wages if hired were subsidized by the government. The experts for both sides admitted that the OJT referrals here were hard to distinguish from regular referrals, including persons with manufacturing experience, some college education, supervisory experience, and craft experience. Tr. 1870-77, 2004. Even when broken down by type of referral, however, the racial disparities remained. The company hired 90% of regular white referrals from MSES, compared to 26.3% of regular black referrals, and hired 83.3% of white OJT referrals, compared with 61.9% of black OJT referrals. Dr. Haworth segmented the MSES hiring into six units, one for each job order. One job order still involved a statistically significant racial disparity, so she discarded it. Her exhibit admitted that the company's hiring on all the regular job orders showed a statistically significant racial disparity, and this remained even when she discarded the job order mentioned above.[8] DX-122-A. The district court approved Dr. Haworth's analysis of the company's hiring from 1985 MSES referrals and found no discrimination. App. at 186a. The panel majority affirmed. App. at 20a-21a.

Promotions to leaders and foremen are virtually all made from within the company's own workforce, there are no objective qualifications for these positions, and there is no evidence in the record showing that there is any racial difference in the ability of production workers to meet the subjective qualifications. Nevertheless, the district court approved Dr. Haworth's use of an external measure of availability: the 19.1% representation of blacks among supervisors of precision production workers, *i.e.*,

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[8] In one of Dr. Haworth's segmented hiring analyses, she included hires from the MSES job orders but applied her very low standard of availability to these hires, without including the applicants referred by MSES in her "applicant flow". DX-123.

craft workers. App. at 222a-224a. The court of appeals affirmed this finding, stating that the company's supervisors were included among the supervisors of precision production workers. App. at 26a n.24. The undisputed evidence is to the contrary: Dr. Haworth testified on cross-examination that only the company's Maintenance Department supervisors were included in this figure, Tr. 1941-43, and these supervisory jobs are not included in petitioners' claim of discrimination. The dissent found the district court's and majority's analysis "greatly misleading". App. at 71a-77a.

Although the district court and the panel majority were extremely quick to find rationalizations for discounting and finding worthless every statistical disparity showing that blacks were disfavored, when petitioners pointed out that the hiring, promotions, and temporary upgrades of blacks was far more substantial during the concededly relevant period from January 1, 1978 to the arrival of Mr. Grizzard than they were during the Grizzard years, both the district court and the panel majority were quick to speculate -- in the absence of any evidence whatsoever -- that there was racial discrimination *against whites* in the pre-Grizzard years. *See* App. at 24a as to promotions ("the bias in favor of blacks during the pre-Grizzard period"); App. at 179a ("Plaintiffs' analysis in this case fails to take into account the distinct possibility that the hiring rate prior to the period beginning October, 1982, may indeed have been discriminatory in favor of black applicants."); 233a ("in the pre-Grizzard period blacks were given more favorable treatment -- the system was not neutral"); *and see* the dissent below at 77a n.29.

The district court's and Court of Appeals' views of all claims were strongly affected by their conclusion that there was no pattern of racial discrimination against blacks.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE PRIOR DECISIONS OF THIS COURT AS TO WHETHER A COURT OF APPEALS MUST CONSIDER THE ENTIRE RECORD WHEN DETERMINING WHETHER THE TRIAL COURT'S FINDINGS ARE CLEARLY ERRONEOUS, OR MAY INSTEAD FOREGO REVIEW WHEN THE LOWER COURT'S FINDINGS ARE SUPPORTED BY THE TESTIMONY OF THE PREVAILING PARTY'S EXPERT WITNESS

Time and again, this Court has emphasized that an appellate court examining a trial court's findings under Rule 52(a), F.R.Civ.P., must examine the entire record.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), held that:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Accord, Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

It makes no difference that the findings the Court of Appeals declined to review, and the evidence it declined to consider (the bulk of petitioners' evidence), involved expert testimony. In *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982), this Court held that Rule 52(a)

"does not make exceptions or purport to exclude certain categories of factual findings". *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949), held that the "clearly erroneous" test of Rule 52(a) applies to expert testimony.

This Court has previously confronted the same situation. *Bazemore v. Friday*, 478 US 385, 397-98 (1986), unanimously held that the district court had erred in its "refusal to accept the petitioners' expert statistical evidence as proof of discrimination by a preponderance of the evidence." There, both lower courts had rejected petitioners' multiple regression analyses because they partially reflected the effects of pre-Act discrimination and because they did not include all measurable variables. The court of appeals held that this evidence was "unacceptable as evidence of discrimination", a view which this Court held was "plainly incorrect." Normally, omissions may affect the probative value of evidence, but not its admissibility. The Court stated:

> A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.

478 U.S. at 400. The Court continued at 401:

> In this case the Court of Appeals failed utterly to examine the regression analyses in light of all the evidence in the record.

Similarly, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975), involved an intense review of conflicting expert testimony with respect to the validity of employ-

ment tests.

This Court made clear in *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 534 n.8 (1979), that a court of appeals has the "unavoidable duty" to "determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are." A district court may not ignore the evidence, or pay attention only to one party's submissions. *Lewis v. Bloomsburg Mills,* 773 F.2d 561, 570 (4th Cir. 1985). When an appellate panel does so, the entire purpose of review is defeated. The orderly administration of justice requires no less. A rule immunizing from further review the statements of the first expert to be accepted by the trial court would wreak havoc.

No proposition is more central to the concept of appellate review than the concept that the entire record must be examined. The holding of the court of appeals that it need not consider petitioners' expert evidence because of the deference it believed must be paid to findings supported by the winning side's expert makes such review illusory.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINION IN *WARDS COVE PACKING CO. v. ATONIO,* ON THE DEGREE OF THE BURDEN REQUIRED TO IDENTIFY THE EMPLOYMENT PRACTICE CAUSING THE DISPARATE IMPACT

In *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656-58 (1989), the Court held that plaintiffs in a Title VII disparate-impact case are required to identify the specific employment practice which caused the disparate impact.

Here, petitioners showed a large drop in the hiring of blacks, which both lower courts attributed to the company's decision not to provide application forms to persons seeking to apply at times when the company is hiring. It is literally impossible for a Title VII plaintiff to make any further showing in such a situation. The holding below that such a showing is not enough to identify the practice causing the disparate impact conflicts with *Wards Cove* itself. Nothing in *Wards Cove* suggests that this Court was demanding of Title VII plaintiffs a burden impossible to carry; the Court expressly noted that the causation requirement would not be "unduly burdensome" to meet. 490 U.S. at 657-58.

Green v. USX Corp., 896 F.2d 801, 805 (3rd Cir.), *cert. denied*, 498 U.S. 814 (1990), held that the disparate impact of a subjective interviewing system was established by proof that the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees. Here, the panel majority held that proof that black hiring rates tumbled after Personnel Manager Haynes started restricting access to application forms, which it attributed to the effect of the changes in themselves, was not sufficient. The dissent correctly stated that this was error. App. at 66a, 71a.

Resolution of this question is important. Facially neutral employment practices can cause barriers to the employment and advancement of members of minority groups and of women which are every bit as exclusionary as the most rigorous forms of intentional discrimination. If Title VII plaintiffs are held to impossibly difficult burdens in identifying the practices causing the disparate impact, these barriers will go unchallenged and the intent of Congress in enacting Title VII will in part have been defeated.

III. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINIONS, ON THE PROPER EVALUATION OF STATISTICAL EVIDENCE AND ON THE IRRELEVANCE OF SPECULATION

In a plethora of decisions, this Court has attempted to chart a path for the lower courts to follow in the evaluation of statistical evidence in Title VII cases. *Wards Cove, supra; Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). All of this work is rendered meaningless if Title VII plaintiffs who have made statistical showings meeting the standards of this Court can be defeated on the basis of unfounded speculation as to campaigns to increase the proportion of applications filed by blacks, presumptions of past discrimination *against whites,* and the like. *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 621 (1974), held that "supposition" and "speculative inference" are not enough.

It is also impossible to use statistical evidence to prove discrimination if such evidence can be defeated by the simple expedient of a defense expert's subdivision of the data into ever-smaller units, so as to make it impossible for a test of statistical significance to be able to detect the significance. Many of the courts of appeals have confronted this situation; until entry of the decision below, all had resolved it by requiring the aggregation of data in a meaningful way, to avoid the unfair exoneration of the defendant. *Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326, 336 n.17 (4th Cir. 1983) (aggregation over years), *cert. den.,* 466 U.S. 951 (1984); *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee,* 833 F.2d 1334, 1339 note 7 (9th Cir. 1987) (same), *cert. den.,* 487 U.S. 1210 (1988); *EEOC*

v. American National Bank, 652 F.2d 1176, 1193 n.12, 1194 (4th Cir. 1981) (aggregation across facilities), *cert. den.*, 459 U.S. 923 (1982); *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983) (aggregation across tests).

If the fair employment laws are to work as Congress intended, it is essential, where racial or sexual discrimination has actually occurred, that there be some way in which a plaintiff can prove the discrimination. The standards adopted by the panel majority allow defendants to escape all accountability by "smoke-filled mirrors", as the dissent originally put it, App. at 163a. Similar techniques are available in all cases. Unless this decision is reviewed, Title VII defendants across the country will try such techniques to defeat liability and bar all remedies for their discrimination.

CONCLUSION

For the reasons stated above, petitioners Daniel Anderson, Jr., *et al.*, request this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioners,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX

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United States Court of Appeals,

Fifth Circuit.

No. 92-7554.

Daniel ANDERSON, Jr., et al., Plaintiffs-Appellants,

v.

DOUGLAS & LOMASON CO., INC., et al.,

Defendants,

Douglas & Lomason Co., Defendant-Appellee.

June 23, 1994.

As Corrected July 28, 1994

Appeal from the United States District Court for the Northern District of Mississippi.

Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The plaintiffs brought a class action lawsuit against the Douglas & Lomason Co. ("D & L" or "the Company") on July 5, 1985, alleging that D & L intentionally discriminated against blacks in its hiring, promotion, and termination practices. The district court, after a lengthy bench

trial, entered judgment against the plaintiffs on their Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 claims. We affirm the district court's decision.[1]

I

D & L operates a plant in Cleveland, Bolivar County, Mississippi, that manufactures automobile parts. The plant employs approximately 657 people, 70% of whom are black. Applicants seeking entry-level positions with D & L need only meet certain minimal requirements, such as being at least eighteen years of age, physically able to perform the work, and able to read and write. The plaintiffs challenge certain hiring, promotion, and termination practices followed by D & L at the Cleveland plant after James Grizzard became plant manager in October 1982. The period between October 1982 and April 1986, when Grizzard ceased being manager at the Cleveland plant, was referred to at trial as "the Grizzard years."

A

The plaintiffs first challenge the hiring practices adopted by Patty Haynes when she became personnel manager at the Cleveland plant in September 1981. Haynes's hiring practices, which D & L followed throughout the Grizzard years, substantially differed from those of her predecessor, Harold Keeton. Keeton allowed employees to take applications for other persons, allowed

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[1]The plaintiffs in this case earlier appealed the decision of the district court denying their application for preliminary injunctive relief that would have regulated the hiring practices of D & L. We affirmed the district court's decision to deny a preliminary injunction in *Anderson v. Douglas & Lomason Co.*, 835 F.2d 128 (5th Cir.1988).

people to submit applications twenty-four hours a day, took applications whether or not D & L was hiring, and kept all applications in his "active" file for one year. He generally interviewed two to three applicants for every available position. In making hiring decisions, Keeton looked at the applicant's experience and attempted to hire those applicants with the most relevant work experience. Haynes, on the other hand, would not let employees take applications home, required all people who wanted to apply for employment to come to D & L's plant, accepted applications only when D & L was hiring, and kept applications for six months. She also accepted only one or two applications for every available position. Haynes testified that in making hiring decisions, she looked at the applicant's relevant work experience and would hire "the best person for the job."

During periods when D & L was hiring, Haynes permitted individuals who called the Company seeking information about possible employment to make appointments at which they could fill out an application. Haynes also accepted applications from individuals who came to the plant without appointments.[2] If a person called or came to the plant while D & L was hiring but after the applicant pool reached what Haynes considered to be the optimal size, plant guards told the individual either that

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[2]Because of the large number of employees involved in deciding when D & L needed to hire employees, news that D & L was hiring quickly spread throughout the Company's general work force. For example, on one occasion individuals came to the plant to fill out applications even before Grizzard told Haynes that D & L would be hiring additional employees.

D & L was not hiring or was not taking applications.[3] During periods that D & L was not hiring, Haynes or the guards informed individuals inquiring about employment either that the Company was not taking applications or was not hiring. Thus, it was possible for individuals to be told that D & L was not taking applications both when the Company was and was not hiring.

D & L also hired employees in what can best be called "spurts." Grizzard, after meeting with his department heads and supervisors, would determine whether D & L needed to hire additional workers. If D & L did need additional workers, Grizzard would so inform Haynes, who would begin taking applications. Haynes then would hire the number of employees sought by Grizzard. D & L rarely hired employees on a one-at-a-time or continuous basis and sometimes went months without hiring anyone.

D & L modified its application and hiring procedures in May 1985 by using the Mississippi State Employment Service ("MSES") to provide a pool of applicants from which it could hire. When D & L needed to hire employees, it would notify the MSES. The MSES then would refer both regular and on-the-job-training ("OJT") applicants to D & L.[4] Haynes would interview the referred applicants and select new employees using separate job orders for the regular and OJT applicants

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[3]A security fence, gate, and guardhouse prevented unauthorized persons from entering the plant. Haynes instructed the guards to allow people to enter the plant to fill out applications only when D & L was hiring and also gave the guards the names of those individuals with appointments to fill out applications.

[4]D & L received financial benefits from the state's on-the-job training program for every OJT applicant hired.

hired. All hiring from the MSES referrals occurred on three separate spurts from May to September 1985. D & L has not hired any production workers since that time.

B

The plaintiffs next contend that D & L engaged in a pattern or practice of discrimination by refusing to promote blacks to leader and foreman positions.[5] D & L had no written criteria or guidelines for promotions, and Grizzard did not post notices concerning available promotion opportunities. Instead, department supervisors selected leaders and foremen for their departments with little or no input from Grizzard. Although D & L did not have written criteria for promotions, the supervisors consistently applied the following subjective criteria when selecting leaders and foreman: attitude, work record, relevant work experience, leadership abilities, willingness to help other employees, commitment to D & L, and seniority. Thus, D & L's promotion criteria are predominately of a subjective nature.

C

The plaintiffs also allege that D & L engaged in discriminatory practices by failing to provide blacks with temporary upgrades and permanent promotions to maintenance department positions. D & L employed a

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[5]D & L promotes production employees to leaders so that it can evaluate their performance and potential to become foremen. D & L either selects foremen from among the leaders or hires them from outside the company. Both leaders and foremen are paid hourly. D & L also employs salaried supervisors, whom it selects from among the foremen or hires from outside the company. The plaintiffs do not contend that D & L discriminated in promoting blacks to the salaried supervisor positions.

job-bidding process, as required by its collective bargaining agreement with the union representing D & L's employees, whereby employees had to submit bids for available "craft" positions. D & L, however, sometimes gave production employees temporary upgrades to craft jobs on a short-term basis.[6] D & L did not allow employees to bid on temporary upgrade positions, and the supervisors of the departments into which an employee would be temporarily upgraded determined whom to upgrade. The chosen employee's supervisor, however, could block the upgrade if the employee was needed for production work.

D & L considered employees in the general maintenance and rack maintenance departments to hold craft positions. As such, D & L required employees seeking those jobs to participate in the bidding process and maintenance department supervisors selected production employees for temporary upgrades to maintenance positions. The primary duties of general maintenance employees included pipe welding and repairing broken machinery. Welding, however, was the primary function of rack maintenance employees. Consequently, D & L considered welding experience to be more important than seniority for the purposes of temporary upgrades and permanent promotions to maintenance department jobs.

D

The plaintiffs finally contend that D & L discharged employees, using the Company's garnishment policy as a pretext, in retaliation for the employees filing

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[6]D & L would give an employee a temporary upgrade to a craft position when a regular craft employee was ill or on vacation, or simply when D & L needed an additional craft employee because of an increased work load.

charges with the Equal Employment Opportunity Commission ("EEOC"). D & L's shop rules provided that the Company would discharge any employee who received four or more garnishments from different creditors within a two-year period. Under this rule, only those garnishments not satisfied, withdrawn, or stayed within thirty days after D & L informed the employee of their existence counted against the four-garnishment limit. The two-year period began to run on the date D & L discussed the first garnishment with the employee and expired on the date that the thirty-day grace period for the fourth garnishment expired. Haynes, who was responsible for administering the garnishment policy, forgave all garnishments that D & L received before she became personnel manager.

II

A

The plaintiffs contend that the district court erred by analyzing the hiring and promotion class claims under the disparate treatment model instead of under the disparate impact model.[7] We examine discrimination claims using the disparate impact model when employment practices are "facially neutral in their treatment of different groups but ... in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Bhd. of Teamsters v. United States,*

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[7]Even though plaintiffs alleged violations of both § 1981 and Title VII, the elements of both claims are identical. *Flanagan v. Aaron E. Henry Community Health Servs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir.1989); *Payne v. Travenol Lab., Inc.*, 673 F.2d 798, 818 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). Therefore, we employ only one analysis in evaluating the plaintiffs' Title VII and § 1981 claims.

431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). Although class action plaintiffs may challenge subjective or discretionary employment practices under the disparate impact model, *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990, 108 S.Ct. 2777, 2786-87, 101 L.Ed.2d 827 (1988), the use of subjective or discretionary decision-making does not itself create an inference of discriminatory conduct. *Id.* at 999, 108 S.Ct. at 2791 (plurality opinion). Instead,

> "the plaintiff's burden in establishing a prima facie case [of discrimination] goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged.... Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Wards Cove Packaging Co. v. Atonio, 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989) (quoting *Watson,* 487 U.S. at 994, 108 S.Ct. at 2788-89). Thus, "[t]he disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force." *Pouncy v. Prudential Ins. Co.,* 668 F.2d 795, 800 (5th Cir.1982); *see also Wards Cove,* 490 U.S. at 657-58, 109 S.Ct. at 2125 (noting that a plaintiff alleging a discriminatory impact claim must "specifically show[ ] that each challenged practice has a significantly disparate impact on employment opportunities for whites and

nonwhites").[8]

The district court refused to analyze the plaintiffs' hiring and promotion claims using the disparate impact model because they did not identify a specific aspect of subjective decision-making by D & L that was shown to have any causal connection to the alleged class-based imbalance in D & L's general or supervisory work force. The plaintiffs pointed only to D & L's policy requiring individuals to fill out applications at the plant as a specific employment practice causing a class-based imbalance in the work force. This, however, does not justify analyzing the case under the disparate impact model because the plaintiffs did not demonstrate that the disparity they complain of was the result of the challenged policy. *See Wards Cove,* 490 U.S. at 657-58, 109 S.Ct. at 2125. Moreover, the plaintiffs identified no specific policy that allegedly caused a race-based imbalance in the number of persons who received promotions. Instead, the plaintiffs merely launched a wide-ranging attack on the cumulative effects of D & L's employment practices. The disparate impact model is not the appropriate vehicle from which to launch such an attack. *Pouncy,* 668 F.2d at 800. Consequently, the district court did not err in refusing to analyze the plaintiffs' claims using the disparate impact

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[8]After the plaintiff has established a prima facie case of discrimination, "the employer carries the burden of producing evidence of a business justification for his employment practice." *Wards Cove,* 490 U.S. at 659, 109 S.Ct. at 2126. However, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times.*" *Watson,* 487 U.S. at 987, 108 S.Ct. at 2790, *quoted in Wards Cove,* 490 U.S. at 549, 109 S.Ct. at 2126.

model.[9] We thus review the plaintiffs' claims under the disparate treatment model.

B

In a disparate treatment class action, the plaintiffs "must prove discriminatory intent and demonstrate more than 'the mere occurrence of isolated or accidental or sporadic discriminatory acts.'" *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 190 (5th Cir.1983) (quoting *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855). The plaintiffs must establish "by a preponderance of the evidence that racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice." *Id.*

The plaintiffs may establish a prima facie case of disparate treatment "by the use of statistics if a 'gross' disparity in the treatment of workers based on race is shown." *Id.* However, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340, 97 S.Ct. at 1856-57. If

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[9]The district court also held that even if the plaintiffs did present a prima facie case under the disparate impact theory, they would not be able to satisfy their burden of persuasion because D & L "adequately justified the method and manner by which it conducted its hiring and put forth legitimate reasons totally unrelated to race for making the various changes in its practice. As such, ... plaintiffs have failed to show that the proffered hiring practices and changes therein did not serve the legitimate ends of the employer." *Id.* Because we hold that the plaintiffs did not present a prima facie case, we do not review whether they demonstrated by a preponderance of the evidence that they were discriminated against as a result of a specific employment practice.

statistical evidence is insufficient to establish discriminatory intent, the plaintiffs may bolster their case by introducing historical, individual, or circumstantial evidence. *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 568 (5th Cir.1988). The employer then may rebut the plaintiffs' prima facie case "by introducing proof that plaintiffs' statistics are 'inaccurate or insignificant' or by providing a 'non-discriminatory explanation for the apparently discriminatory result.'" *Id.* (citations omitted).

"[T]he ultimate determination of the existence of intentional discrimination is a question of fact, reviewed on appeal under the clearly erroneous standard." *Id.* In determining whether a finding is clearly erroneous, we must give "due regard to the trial court to judge the credibility of the witnesses." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

III

The plaintiffs argue that the district court erred in finding that D & L did not discriminate against blacks by restricting access to application forms. They argue that D & L unlawfully restricted access when Haynes refused to give employment applications to a number of blacks while D & L was seeking to hire new employees.

In attempting to prove a prima facie case, the plaintiffs primarily relied on anecdotal evidence provided by class members. A number of individuals testified that they were unable to obtain applications from D & L. The

district court found this anecdotal evidence unpersuasive because it was consistent with D & L's general application policies. This finding is not clearly erroneous. *See* part VIII.A *infra*. Additionally, the black individuals turned away at the gate by D & L guards never saw D & L give any applications to whites seeking employment, and no D & L employee ever directed derogatory or racially-oriented epitaphs at them.[10] Moreover, around the same time that D & L did not give these black individuals applications, D & L provided applications to many other blacks. Finally, the record contains no evidence indicating that D & L's application procedures affected potential black applicants any differently than potential white applicants.[11] Thus, the district court's finding that D & L did not discriminate against blacks who were seeking applications is not clearly erroneous. *See Falcon v. General Tel.*

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[10]One individual, Poitier Anderson, alleged that a guard told him that the Company was not giving applications to blacks. The district court did not find Anderson's testimony credible because Anderson filed two EEOC claims and filled out an EEOC questionnaire after the alleged statement was made without ever mentioning it. This finding is not clearly erroneous.

[11]The plaintiffs also argue that D & L discriminated against blacks by relying on word-of-mouth to inform interested persons of job openings and that this practice resulted in blacks having less access than whites to hiring information. D & L officials, however, testified that it was common knowledge among all employees, including those in non-managerial positions, that the Company was going to be hiring. In fact, non-employees on occasion knew D & L was about to hire before Grizzard informed Haynes. For example, plaintiff Chris Harris, along with two other blacks, heard from a black, non-supervisory employee that D & L was hiring. However, when Harris, who was waiting at the plant when Haynes arrived for work one morning, asked Haynes for an application, Haynes told her that D & L was not hiring. Later that morning, however, Grizzard informed Haynes that D & L would be hiring new employees, and Harris then obtained an application.

Co., 815 F.2d 317, 322 (5th Cir.1987) (finding that an employer's application procedures were not discriminatory where no evidence was introduced to prove that the procedures affected non-whites any differently than whites).

IV

The plaintiffs contend that statistical and anecdotal evidence established that D & L discriminated against blacks when hiring production workers during the Grizzard years. In comparing the number of blacks hired to the number of blacks who applied for production jobs, however, the district court found no evidence of discriminatory intent.

The job of production worker—an unskilled, entry-level position—required only that applicants be at least 18 years old, be able to read and write, and be able to bend, lift, and stoop. During the Grizzard years, D & L hired 482 production workers—46.5% of those hired were black. Black employees constituted more than 70% of D & L's general work force, and more than 80% of the production work force, during the Grizzard years. In Bolivar County, where D & L's plant is located, 1980 census data indicates that the overall labor force was 51.8% black, with blacks constituting 70.1% of all operators, laborers, and fabricators.

A

1

The plaintiffs first argue that the district court erred in crediting D & L's statistical analysis of its hiring practices during the Grizzard years. The plaintiffs contend that because D & L's statistical analysis was

fatally flawed, the district court should have relied on seven sets of statistical data presented by their expert.[12] D & L, not surprisingly, finds fault with each of plaintiffs' seven standards and contends that the district court correctly relied upon the standard proposed by D & L's expert.

Where plaintiffs use statistical evidence to challenge an employer's hiring practices, that evidence, to be probative of discriminatory intent, must compare the relevant portion of the employer's work force with the qualified population in the relevant labor market. *EEOC v. Olson's Dairy Queens, Inc.*, 989 F.2d 165, 168 (5th Cir.1993). The dispute between the plaintiffs and D & L revolves around how to properly define the "relevant labor market." D & L contends that the labor market should be defined using an "applicant flow" analysis—i.e., arguing that D & L's available labor force is best determined by examining the applications of those persons who actually sought employment with the Company. The plaintiffs, on the other hand, contend that an applicant flow analysis should not be used here because some of the applications submitted during the Grizzard years were not available for examination.[13] Thus, the plaintiffs argue

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[12]The EEOC filed an amicus curiae brief agreeing with the plaintiffs' contention that the district court erred in its statistical analysis of the evidence. We note, however, that the EEOC office in Mississippi rejected as meritless the discrimination charges filed by the plaintiffs.

[13]The plaintiffs also seem to suggest that we should draw adverse inferences against D & L because of the Company's failure to preserve employment applications for a one year period, pursuant to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(A)-(B) (1978). However, the "Uniform Guidelines are not legally binding. They have not been promulgated as regula-

(continued...)

that any one of their seven different methods of measuring the relevant labor market was superior to D & L's applicant flow analysis.[14]

Actual applicant flow figures are the preferred method by which to measure an employer's hiring practices and performance. *Olson's Dairy Queens,* 989 F.2d at 168; *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1025 (5th Cir.1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *Hester v. Southern Ry. Co.,* 497 F.2d 1374, 1379 (5th Cir.1974); *see also Mister v. Illinois Cent. Gulf R.R. Co.,* 832 F.2d 1427, 1435 (7th Cir.1987) ("Statistical analysis of the actual applicants has the advantage of self-selection: the study examines how the employer actually treated people who wanted the job. Applicant studies are preferable as a rule because Title VII governs the treatment of applicants."). "Other

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[13](...continued)
tions and do not have the force of law." *Clady v. County of Los Angeles,* 770 F.2d 1421 (9th Cir.1985) (citing *General Elec. Co. v. Gilbert,* 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976)), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986). Moreover, the applications kept by D & L roughly correspond to the six month period preceding the plaintiffs' filing of their EEOC charges. Although D & L normally would have discarded the April applications after six months, Haynes testified that she kept all applications after being notified of the EEOC charges. Consequently, the number of applications available for analysis was consistent with D & L's policy of keeping applications for only six months. We therefore decline to follow the plaintiffs' suggestion.

[14]Because we agree with the district court that actual applicant flow was the best measure of D & L's performance, we need not address whether the district court erred in failing to follow the seven standards offered by the plaintiffs to define the labor pool available to D & L. The district court rejected each standard as being flawed.

statistical measures are necessarily imperfect in differing ways and varying degrees. The best the court can do is to accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little." *Phillips,* 637 F.2d at 1025. Thus, when applicant flow figures are flawed or otherwise unavailable, we have allowed plaintiffs to use other statistical measures to establish a prima facie case of discrimination. *See, e.g., id.* (noting that actual applicant flow figures were unavailable because the employer did not identify applicants by race); *Robinson v. Union Carbide Corp.,* 538 F.2d 652, 657-58 (5th Cir.1976) (upholding the district court's refusal to employ an applicant flow analysis), *modified in part on other grounds,* 544 F.2d 1258 (5th Cir.1977).

D & L's statistical expert, Dr. Joan Haworth, testified that, according to an applicant flow analysis, D & L did not discriminate in hiring black applicants. Haworth found that from April 1984 to January 1985, blacks constituted 46.7% of all applicants. She then compared this figure to the percentage of applicants hired by D & L during the Grizzard years who were black—45.5%—and determined that the difference was not statistically significant.[15] Thus, Dr. Haworth concluded, D & L did

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[15]Dr. Haworth divided the applications into six "pools," which reflected each hiring event, and compared the percentage of blacks and whites hired from the applicants in each pool. Only one hiring pool—pool 5, which covered the one-month period of October 1984—reflected a statistically significant standard deviation. Haworth also analyzed the pools on an aggregate basis, comparing the percentage of blacks hired who applied from April 1984 through mid-January 1985. She found what the parties agree to be a statistically significant standard deviation. Haworth testified, however, that pool 5 largely accounted for the deviation. When she excluded pool 5 from the analysis, she found the standard of deviation to be

(continued...)

not engage in discriminatory hiring practices.

The plaintiffs challenge Dr. Haworth's analysis on several grounds. They first assert that D & L did not keep all applications from the April to October 16 period, thus skewing the analysis so that the number of black applicants from that period was understated. As evidence of D & L's selective retention of applications, the plaintiffs point to the large difference between the number of applications submitted by blacks during the April to October period and the October 17 to January period.[16] The district court found, however, that one explanation for the large increase in applications submitted by blacks during the latter period was that Oliver Robinson, a black D & L employee, had begun a campaign to encourage blacks in Bolivar County to apply for employment at D & L and file discrimination charges against D & L with the EEOC.[17] This finding is not clearly erroneous.

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[15](...continued)
statistically insignificant. The district court credited Haworth's testimony that the aberrational result found in pool 5 was due to the fact that the percentage of white applicants with relevant employment experience was higher in pool 5 than in other pools. As a result, the district court found that pool 5 should be excluded from the analysis as an anomaly. This finding is not clearly erroneous. *See Lewis v. NLRB*, 750 F.2d 1266, 1276 n. 17 (5th Cir.1985) (noting that one significant standard deviation did not establish disparate treatment).

[16]Applications submitted by blacks constituted 37.6% of the April to October applications and 60.4% of the October to January applications.

[17]In reviewing the record, we note that many of the witnesses had little or no familiarity with the charges that they signed and filed with the EEOC. Indeed, one person—Richard Grant—stated that he did
(continued...)

As additional evidence that D & L failed to retain applications, the plaintiffs contend that the number of applications retained by D & L indicates that Haynes accepted approximately eight and one-half applications for every seven positions filled during the pre-suit period, but accepted about ten applications for every seven positions filled during the post-suit period. The plaintiffs contend that the difference demonstrates that D & L did not retain all applications from the April to October period. Haynes, however, testified that she believed she kept all the applications from the April to October period, although she ultimately was unsure whether she had discarded some applications. Moreover, Haworth testified that while she believed she had all the relevant applications, she nevertheless had a "reasonably large amount" of the applications for the purposes of her analysis. The district court resolved this dispute by finding that D & L did retain all applications pertaining to the relevant period, and we cannot say that this resolution was clear error. *See Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 901 (5th Cir.1987) (finding that the district court did not err in accepting an employer's statistical analysis because, while it was flawed, the plaintiffs' analysis suffered from more serious deficiencies); *Nash v. City of Houston Civic Ctr.*, 800 F.2d 491, 497 (5th Cir.1986) (noting that where there are competing yet permissible views of the evidence, we must affirm the district court's finding).

The plaintiffs next argue that even if the applicant flow analysis was the best standard by which to measure the labor pool available to D & L, the district court erred in accepting Dr. Haworth's analysis because it was based on samples too small to allow for a meaningful statistical

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[17](...continued)
not read the charge but merely signed it when it was presented to him. *See* note 46 *infra.*

analysis. When statistics are based on small sample sizes, the plaintiffs contend, the presence or absence of statistical significance is not a reliable indicator of discrimination. Whether or not a sample is too small to yield statistically meaningful results, however, must be determined on a case-by-case basis. *Watson*, 487 U.S. at 995 n. 3, 108 S.Ct. at 2789 n. 3; *Rendon v. AT & T Technologies*, 883 F.2d 388, 397 (5th Cir.1989). The district court found Dr. Haworth's analysis to be more credible and more persuasive than the seven analyses offered by the plaintiffs' expert. "We do not have the statistical expertise to declare a particular statistical technique inappropriate where a qualified expert expresses a contrary view and the district court credits the testimony." *Id.; see also Trevino*, 811 F.2d at 904 (holding that the district court did not err in crediting the defendant's statistical evidence over contrary evidence); *Nash*, 800 F.2d at 497 (noting that we must affirm the district court's finding where there are two permissible views of the evidence). Thus, we find that the district court did not err in crediting D & L's statistical analysis, which demonstrated that D & L did not engage in discriminatory hiring practices, over the analyses offered by the plaintiffs.[18]

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The plaintiffs further argue that the district court

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[18]Assuming *arguendo* that the pools were too small to permit meaningful statistical analysis, Dr. Haworth also analyzed the pools on an aggregate basis and found no statistically significant deviation when pool 5 was omitted. *See* note 15 *supra*. Thus, this analysis, which the district court also credited, was not based on a sample significantly smaller than that utilized by the plaintiffs' expert. Therefore, the district court did not clearly err in refusing to find that D & L possessed discriminatory intent with regard to its hiring practices.

erred in accepting Haworth's analysis of D & L's hiring practices during the period in which the Company exclusively relied upon MSES to provide acceptable applicants. In relying on Dr. Haworth's analysis, the district court found that her job-order-by-job-order analysis was more persuasive because it more closely reflected the actual process through which D & L hired employees. The plaintiffs' analyses, *tout au contraire,* grouped the six different job orders into one set of statistics.[19]

D & L placed job orders with MSES three times during the Grizzard years. On each occasion, D & L sought two types of referral—one order requested regular referrals and one order requested OJT referrals. Dr. Haworth compared the percentages of blacks and whites hired by D & L for each separate job order and found that in only one job order did the difference between the actual and expected number of blacks hired exceed two standard deviations.[20] The district court found, in light of the record as a whole, that this single statistical disparity did not establish a prima facie case of discriminatory intent. We find that the district court's conclusions regarding the statistical analyses of D & L's hiring practices are not clearly erroneous. *See Lewis v. NLRB,* 750 F.2d 1266, 1276 n. 17 (5th Cir.1985) (noting that a single statistically significant disparity "by no means

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[19]The plaintiffs' analysis showed that D & L hired 84.4% of white applicants and 50.8% of black applicants referred by the MSES.

[20]The plaintiffs again contend that the district court should not have accepted Haworth's analysis because it was based on sample sizes too small to yield meaningful statistical data. Whether a sample is too small to yield meaningful results is a determination made by the district court on a case-by-case basis. *Watson,* 487 U.S. at 995 n. 13, 108 S.Ct. at 2789 n. 13; *Rendon,* 883 F.2d at 397. Under the facts of this case, the district court did not clearly err in accepting D & L's analysis.

commands an inference of discrimination").

B

The plaintiffs attempted to buttress their statistical evidence with anecdotal evidence regarding class members whom D & L allegedly did not hire because of their race. While Title VII plaintiffs may use evidence regarding individual instances of discrimination to bolster their class claim, *Bernard,* 841 F.2d at 568, the district court found that D & L did not discriminate in refusing to hire the individuals at issue. This finding is not clearly erroneous. *See* part VIII.B *infra.* Accordingly, the plaintiffs' anecdotal evidence, combined with their statistical evidence, did not establish a prima facie case of disparate treatment.

V

The plaintiffs introduced statistical, historical, and anecdotal evidence in an attempt to prove that D & L unlawfully discriminated against blacks when promoting employees to leader and foreman positions. The plaintiffs' statistical evidence regarding the promotion claim compared the number of blacks promoted to leader and foreman positions during the pre-suit Grizzard years with the percentage of blacks present in D & L's work force; the plaintiffs also sought to compare the percentage of promotions received by blacks during the pre-suit Grizzard years with the respective percentages for the pre-Grizzard and post-suit periods. D & L, on the other hand, introduced statistics comparing the number of blacks holding leader and foreman positions to the number of blacks holding supervisory positions in Bolivar County. The district court ultimately determined that D & L's statistical analysis was the better one and therefore credited it. Moreover, the district found that the historical, anecdotal, and other circumstantial evidence submit-

ted by the plaintiffs did not establish that D & L engaged in a pattern or practice of discrimination. The plaintiffs, of course, challenge these determinations.

A

A court may infer that an employer engaged in racial discrimination when promoting workers if statistics, when comparing the number of non-whites and whites promoted, demonstrate a gross statistical disparity. *Lewis,* 750 F.2d at 1271. Statistical evidence, however, must be meaningful in light of all the surrounding facts and circumstances. *Pouncy,* 668 F.2d at 1275. "In establishing an inference of discrimination from statistical evidence, the 'required comparison [is] to a *qualified* pool of employees *presumptively eligible* for promotion.'" *Lewis,* 750 F.2d at 1275 (quoting *Pouncy,* 668 F.2d at 803).

1

The plaintiffs introduced statistical evidence comparing the percentage of leader and foreman promotions given to blacks during the Grizzard years—23%—to the percentage of black employees in D & L's production work force—80%. According to the plaintiffs, these statistics indicated a pattern of discrimination in the promotion of D & L employees to leader and foreman positions. The plaintiffs contend that this comparison is appropriate because D & L selected leaders and foremen from within the organization. The district court rejected the plaintiffs' approach as being overbroad because not everyone in D & L's production work force was qualified for promotion. The district court further found that because D & L had hired individuals from outside D & L's work force to be foremen and supervisors, the plaintiffs' approach was too narrow because it excluded individuals outside D & L's production work force who

were qualified to be leaders and foremen.[21] We agree that the plaintiffs made the forbidden assumption that all D & L employees were equally qualified for promotion. *See Lewis,* 750 F.2d at 1275 (rejecting the plaintiffs' analysis because they brought into their comparison "employees who are not to be considered for promotion"); *Pouncy,* 668 F.2d at 803 (refusing to infer that an employer discriminated against black employees in awarding promotions simply because the plaintiffs demonstrated that the percentage of black employees promoted was "far

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[21]The district court also found that even if it was proper to use the number of blacks in D & L's production work force as a benchmark, the evidence did not establish a prima facie case of discriminatory conduct:

> [W]hen comparing the percentage of blacks in the leader, foreman, and supervisor classifications at the company to the percentage of blacks in the production workforce, the ratio of the percentage [of] black[s] in supervisory categories (42%) to the percentage of blacks in production workforce (80%) is much higher than the similar proportion of the Bolivar County figure of 19 percent black in supervisors of production workers, when compared with the blue-collar (60.7%) and manufacturing (58.2%) rates. Stated otherwise, if blacks at [D & L] were represented in supervision in the same percentage as in other industries in Bolivar County relative to the percentage in the production workforce, the benchmark would only be 25%, or seventeen percentage points less than what it has been. Thus, even from the perspective of plaintiffs, the defendant's performance relative to its production workforce far exceeds the performance of other Bolivar County companies.

Record Excerpts at 91. As we uphold the district court's determination on other grounds, we need not reach this issue.

less" than the percentage in black employees in the employer's work force). Consequently, the district court did not err in finding the plaintiffs' statistical evidence for leader and foreman promotions unpersuasive.

2

The plaintiffs also introduced statistical evidence showing that blacks constituted 64% of persons promoted to leader and foreman positions during the pre-Grizzard and post-suit periods, but only 23% of those promoted during the pre-suit Grizzard period. The plaintiffs also note, however, that during the pre-Grizzard period, blacks apparently received favorable treatment with regard to promotions: whites worked on average for 71.8 months before promotion while blacks worked on average only 43 months. *See also* note 29 *infra.* Because of the bias in favor of blacks during the pre-Grizzard period, the district court found it unhelpful to compare statistics from that period with statistics from the post-Grizzard periods. *Cf. Lewis,* 750 F.2d at 1275 n. 14 (noting that an employer's affirmative action program could skew statistical analyses in disparate treatment cases). Because D & L was not required to continue the preferential treatment given black employees during the pre-Grizzard period, *see United Steelworkers v. Weber,* 443 U.S. 193, 205-06, 99 S.Ct. 2721, 2728, 61 L.Ed.2d 480 (1979), the district court thus did not err in disregarding the plaintiffs' statistical evidence regarding the pre-Grizzard period.

3

In finding no evidence of discriminatory conduct, the district court accepted D & L's statistical evidence, which compared the percentage of black supervisors at D

& L to the percentage of black supervisors county-wide.[22] We believe that the district court erred in comparing the total number of black supervisors at D & L to the number of black supervisors county-wide. An employer cannot escape liability under Title VII by demonstrating that, at the bottom line, minorities are represented in supervisory capacities at non-discriminatory levels. *See Wards Cove,* 490 U.S. at 655-57, 109 S.Ct. at 2124; *Connecticut v. Teal,* 457 U.S. 440, 450, 102 S.Ct. 2525, 2532, 73 L.Ed.2d 130 (1982). Thus, the relevant comparison is between the number of blacks promoted during the pre-suit Grizzard years and the number of blacks that statistically should have been promoted in the absence of any discrimination.[23]

The plaintiffs have demonstrated that blacks received 23% of all promotions during the pre-suit Grizzard years. At the same time, blacks constituted 19.1% of the supervisors in production-related occupa-

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[22]D & L demonstrated that blacks constituted 42% its leaders, foremen, and supervisors during the Grizzard years. Based on this evidence, the district court found that the percentage of black employees in supervisor positions at D & L "was not only well within but beyond the range of what would be expected when compared with the relevant labor market, which, in this case, is the percentage of blacks in supervision in production occupations."

[23]However, a demonstration by the employer that, at the "bottom-line," blacks were overrepresented in its work force still is relevant to the ultimate determination whether the employer engaged in a pattern or practice of discrimination. *See St. Mary's Honor Center v. Hicks,* --- U.S. ----, ----, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993).

tions in Bolivar County.[24] The district court, because blacks were represented in D & L's work force in a ratio higher than statistically predicted,[25] inflated the 19.1% figure to 25%—i.e., blacks statistically should have received 25% of all promotions to leader and foreman positions. Because the number of blacks who received promotions is not statistically different from the number of blacks expected to receive promotions,[26] the district

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[24]The plaintiffs challenge the district court's use of this figure, arguing that it encompassed only supervisors of "precision" production occupations, such as metal working occupations, apprentices, boilermakers, and sheet metal workers. On direct examination, however, D & L's expert, Dr. Haworth, testified that leaders and foremen at D & L would be included in the 19.1%-black figure. The district court did not err in resolving this credibility dispute in favor of D & L. *Anderson*, 470 U.S. at 575, 105 S.Ct. at 1512. The district court reasonably concluded that the figure was sufficiently similar to the occupation of D & L supervisors, especially when the plaintiffs failed to introduce any evidence to the contrary.

[25]At all times during the relevant period, D & L's workforce was more than 70% black, and the production workforce was approximately 80% black. 1980 Census data showed that the civilian labor force in Bolivar County was 51.9% black, the manufacturing labor force was 58.2% black, and the blue-collar labor force was 60.7% black.

[26]Applying the mathematical formula suggested in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the difference between the number of blacks expected to receive promotions and the number who actually did receive promotions is not statistically significant (total of 22 promotions):

$$\text{Number of S/D} = \frac{\text{O-NP}}{\text{NP (1-NP)}}$$

S/D = Standard Deviations

(continued...)

court did not err in failing to find an inference of disparate treatment with regard to D & L's promotion practices. *See Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362 n. 3 (5th Cir.1986) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below."), *cert. denied,* 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

B

The plaintiffs contend that because D & L based its promotion decisions on subjective criteria, D & L could have failed to promote blacks for discriminatory reasons. The district court rejected the plaintiffs' argument. A promotional system that is based upon subjective criteria is not "discriminatory per se." *Page v. U.S.*

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[26](...continued)

O = Actual number of blacks who received a promotion

N = Number of workers who received a promotion

P = Probability of a black being promoted from the relevant population

Thus, $\frac{5 - (22 \times 25\%)}{2.03} = -0.25$

See also Lopez v. Laborers Int'l Union Local No. 18, 987 F.2d 1210, 1215 n. 14 (5th Cir.1993); *Lewis,* 750 F.2d at 1274 n. 12. Because the difference is less than 2 standard deviations, it is not statistically significant. We also note that if we use 42%—the number of D & L leaders, foremen, and supervisors who were black—in place of 25%, the difference between the number of blacks promoted and the expected number (9.24) still is not statistically significant (1.84 standard deviations). Consequently, the plaintiffs failed to prove a prima facie case of discrimination.

Indus., Inc., 726 F.2d 1038, 1046 (5th Cir.1984); *see also Watson*, 487 U.S. at 990, 108 S.Ct. at 2786 ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."). However, "promotion systems utilizing subjective evaluations by all white supervisors" can be evidence of discrimination in disparate treatment cases. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 827 (5th Cir.1982); *Lewis*, 750 F.2d at 1276.

This case is distinguishable from our prior holdings, however, because the D & L supervisors who evaluated and promoted employees were both black and white. As the district court found,

> [w]hile the subjectivity of the criteria of attitude and commitment could result in racial disparity in the potential for promotion, it is clear from the record evidence that the individuals recommended or considered for promotion included black individuals recommended by white foremen and supervisors, white individuals recommended by black foremen and supervisors, and individuals recommended by both.

Record Excerpts at 90; *cf. St. Mary's Honor Ctr. v. Hicks*, --- U.S. ----, ----, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993) (noting that evidence in a hiring case tending to negate a finding of discrimination includes the fact that the hiring officer is of the same minority group as the plaintiff). The district court's finding is supported by the

evidence.[27] Accordingly, the district court did not err in refusing to find that the subjective component of D & L's promotion policy constituted evidence of discriminatory intent.[28] *See Bernard,* 841 F.2d at 547 (holding that an employer's unwritten and subjective standards for promotion were not discriminatorily applied).

C

The plaintiffs introduced evidence of the comparative seniority of white and black employees prior to promotion to support their argument that D & L was discriminating against blacks by promoting less senior

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[27]Grizzard recommended to his supervisors that they consider Harold Brown, Richard Grant, Marilyn Holmes, and Vera Watson—all black employees—for promotion. Richard Williams, a black supervisor, testified that he offered one promotion to four black employees, who rejected it, before offering it to Robert LaPresto, a white employee. Charlie West, another black supervisor, recommended James Haney, a white employee, for promotion. L.C. Taylor, a black shift supervisor, recommended Chris Strickland, a white employee, for promotion while Howard Watson recommended Vera Watson, a black employee, for a leader position. E.W. Tolbert, a black supervisor, testified that he was involved in promoting Randy Daniels, a white employee who was offered a promotion only after six black employee had turned it down. *See also* part V.C *infra.*

[28]We also note that D & L substantially increased the number of blacks holding salaried supervisor positions, which the plaintiffs exclude from their claim that D & L discriminated against black employees with regard to promotions. Grizzard promoted E.W. Tolbert from a shift supervisor position to production manager, the second-in-command at the plant. Charlie West then took over Tolbert's position as a shift supervisor. Grizzard also promoted Richard Williams from supervisor to department head, Vera Watson to foreman and then to shift supervisor, and Harold Brown, Charlie Lofton, and Sylvester Parker from foremen to salaried supervisors.

whites.[29] The district court rejected this evidence because it ignored that more senior black employees turned down several promotions later given to less senior white employees.[30]

The average length of time between promotions

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[29]According to the plaintiffs, white employees between 1978 and September 1982 worked for D & L on average 71.8 months before promotion; black employees on average worked only 43.2 months before promotion. During the presuit Grizzard years, the plaintiffs contend that whites worked on average 15.1 months before promotion and blacks worked on average 84.8 months. We note, however, that using plaintiffs' exhibit 144, whites apparently worked on average 51 months before promotion. While we have not recomputed every number that the plaintiffs cite in their brief, we point out this discrepancy to demonstrate the problems that exist with the plaintiffs' statistical analysis.

[30]The district court also stated that the plaintiffs' evidence

> "paint[ed] a distorted picture which attaches responsibility to Mr. Grizzard for the years before his arrival that a black employee was not being promoted instead of giving him credit for promoting black employees his predecessors overlooked. From this perspective, the court finds that the only way Grizzard could have passed muster was to continue to bypass the senior black employees in favor of recently-hired black employees.... Moreover, plaintiffs have chosen figures which attempt to compare the pre- and post-Grizzard periods for promotions, conveniently ignoring the fact that in the pre-Grizzard period blacks were given more favorable treatment—the system was not neutral. Blacks were on average less senior than their white counterparts by some twenty-eight months."

Record Excerpts at 101-02.

may be relevant in proving discrimination by an employer. *See Pouncy,* 668 F.2d at 804. However, we agree with the district court that the statistics submitted by the plaintiffs are fatally flawed because they overlook the black employees who turned down promotions later offered to white employees. *See Trevino,* 811 F.2d at 902 (finding that the plaintiffs' statistics demonstrating a "significant disparity between Hispanics and non-Hispanics for the total elapsed time from the date of hire" to promotion was "not compellingly persuasive evidence" of discrimination). For example, Robert LaPresto, a white employee, was promoted to leader after being employed by D & L for approximately four months. However, the position was first offered to four black employees who rejected it. D & L promoted James Haney, another white employee, to leader nine months after hiring him, but only after two black employees first declined the offer of promotion. Six black employees rejected a promotion given to white employee Randy Daniels, whom D & L promoted to leader less than two months after his employment began.[31] We also note that during the post-suit period, during which blacks received 64% of the promotions to leader and foreman and about which the plaintiffs do not complain, blacks worked on average 154.9 months before promotion while whites worked only 51 months. This comparison demonstrates that statistics regarding the relative seniority of workers promoted by D & L cannot

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[31]The plaintiffs contend that D & L knew that the black employees would turn down the promotion offers. The district court, however, credited the testimony of E.W. Tolbert—D & L's production manager—that the black employees who turned down promotion offers were offered multiple promotions because they were above-average employees and their supervisors felt that they might accept a new offer, an offer of a different job, or an offer made by someone else. The district court was within its province to resolve credibility disputes, *Anderson,* 470 U.S. at 575, 105 S.Ct. at 1512, and the district court's finding on this issue is not clearly erroneous.

support a finding of disparate treatment. *Cf. Pouncy,* 668 F.2d at 803 (finding that a discrepancy between the mean salaries of black and white employees could be explained by "any number of nondiscriminatory factors," including different skill levels, previous training, and experience). Consequently, like the district court, we refuse to infer from this evidence that D & L's promotion practices unlawfully disfavored black employees.

D

The district court considered evidence put forward by the plaintiffs with regard to alleged individual instances of discrimination and concluded that D & L gave legitimate reasons why it did not promote most of the individuals at issue. The district court also found that D & L did not promote the other individuals simply because they were overlooked or did not come to the attention of management.[32] *See* part VIII.C *infra.* Thus, the anecdotal evidence did not, as the plaintiffs assert, support a finding that D & L engaged in a pattern or practice of discrimination. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 259, 101 S.Ct. 1089, 1097, 67 L.Ed.2d 207 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the appli-

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[32]The plaintiffs contend that the district court's findings would allow D & L to discriminate against many black employees without hindrance as long as the Company treated other blacks the same as white employees. However, "this attack overstates the impact of the district court's ... analysis." *Lewis,* 750 F.2d at 1274 n. 11. D & L introduced evidence demonstrating that legitimate reasons lay behind the delayed promotions for some blacks and the relatively early promotions for some whites. This evidence, as the district court properly found, tended to negate the plaintiffs' attempted showing that a pattern or practice of discrimination in D & L's promotion policies existed. *Id.*

cants does not in itself expose him to Title VII liability...."); *Odom v. Frank*, 3 F.3d 839, 849-50 (5th Cir.1993) (noting that the perpetuation of a "good old boy" network does not amount to racial discrimination). Consequently, the district court did not clearly err in concluding that the plaintiffs' anecdotal evidence did not support their claim of disparate treatment. *See Lewis*, 750 F.2d at 1276-77 (finding that anecdotal evidence supported a finding only of isolated instances of discrimination).

E

The plaintiffs further contend that the district court erred in rejecting their attempt to buttress their statistical evidence of discrimination with evidence regarding D & L's history of discrimination. The plaintiffs argued that D & L's supervisors both used racially derogatory language in speaking to black employees and physically abused them, without any repercussions from upper management. After reviewing the anecdotal evidence presented by the plaintiffs, the district court concluded that D & L at no time encouraged or condoned any mistreatment of black employees by supervisors. Specifically, the district court found that

> [t]he sum total of the evidence with regard to these allegations of what constitutes a claim of hostile environment in the form of disparate treatment of black employees amounts, at best, to proof of isolated acts of the use of vulgar or racially derogatory language by no more than two or three company officials and a single instance of physical contact between a company official and a single black employee, all occurring over a period of three or more years. What is also abundantly clear is that when reported to the appropriate company officials, every complained of incident

> was immediately followed by affirmative company action in the form of apologies to the employees involved, counseling of the managers involved, and/or discipline of those management officials. Moreover, the plaintiffs' allegations relate to the time period after the arrival of the Plant Manager James Grizzard, with there being not a scintilla of evidence that Grizzard participated in or condoned any of the complained of acts, with the exception of possibly two instance of the use of vulgar language, both of which, under the undisputed circumstances, the court finds to have been justified, and one, about which the union filed a grievance, for which Mr. Grizzard apologized.[33]

Record Excerpts at 129-30. The district court further found that some of the individuals who alleged that D & L officials used racially derogatory language were not credible.

It is within the province of the district court to resolve credibility disputes. *Anderson*, 470 U.S. at 564, 105 S.Ct. at 1504. Moreover, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not indicative of a pattern or practice

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[33]Plaintiff Daniel Anderson testified that upon returning to work from a doctor's examination, his supervisor refused to let him take a break that he had missed. Anderson then clocked out and left the plant. Grizzard confronted Anderson the next day, asking him "who in the hell did he think he was to be able to just leave because he couldn't take his break." On the second occasion, Grizzard used the term "son-of-a-bitch" when he discovered that someone had removed a notice from the company bulletin board. When the union filed a grievance regarding the incident, Grizzard issued a written apology that explained his comments were not directed to any of the employees within earshot.

of racial discrimination in violation of Title VII. *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir.1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). After undertaking an independent review of the record, we conclude that the district court did not err in finding that the evidence demonstrated, at best, only isolated instances of racially motivated acts insufficient to establish class-wide disparate treatment.[34] *See Bernard,* 841 F.2d at 569 (holding that the anecdotal testimony of the plaintiffs' witnesses did not establish class-wide disparate treatment).

VI

The class plaintiffs finally argue that the district court erred in finding that D & L did not discriminate against blacks when giving temporary upgrade assignments to general maintenance and rack maintenance positions.[35] They contend that the statistical evidence demonstrated a gross disparity in the treatment of white and black employees, thus establishing a prima facie case of

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[34]We also note that two black salaried supervisors—Charlie West and E.W. Tolbert—and a black foreman—Monroe O'Neal—testified that Grizzard was "a good man," "a super plant manager," and was not prejudiced. Moreover, Tolbert stated that Howard Watson was an "outstanding production manager" who also was not prejudiced.

[35]General and rack maintenance positions are two of the job classifications at D & L's plant considered to be "craft" positions.

discrimination.[36] It does not appear that the plaintiffs presented any expert testimony explaining the meaning or statistical significance of this evidence. Consequently, our review of the evidence has been unduly hampered by the

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[36]The plaintiffs claim that the following statistical evidence established a prima facie case of discrimination:

Table 6. Temporary Upgrades to General Maintenance: Percentage of Total Hours Assigned

Time Period	% White	% Black
Pre-Grizzard Period [1/15/81-10/2/82]	11.60%	88.40%
Grizzard Pre-Suit Period [10/2/82-7/4/85]	92.59%	7.40%
Post-Suit Period [7/5/85-9/19/85]	46.60%	53.40%

Table 7. Temporary Upgrades to Rack Maintenance: Percentage of Total Hours Assigned

Time Period	% White	% Black
Pre-Grizzard Period	85.40%	14.61%
Grizzard Pre-Suit Period	100.00%	0.00%
Post-Suit Period	0.00%	100.00%

Brief for Plaintiffs at 66. In presenting these statistics, the plaintiffs stated only that the statistics were "drawn from [the] stipulated data." After much searching, we discovered that the raw data undergirding these statistics was presented to the district court through a joint stipulation.

plaintiffs' failure to establish whether their statistics were meaningful or significant in light of the particular facts of this case. *See Teamsters,* 431 U.S. at 340, 97 S.Ct. at 1857 (noting that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances"). Nevertheless, after closely reviewing the plaintiffs' evidence, we conclude that the plaintiffs failed to establish a prima facie case of discrimination.

Eleven employees, three of whom were black, received temporary upgrades to general maintenance jobs during the Grizzard pre-suit period. During this period, two white employees—William Myers and James Partridge—received 68% of the total temporary-upgrade hours. By comparison, two black employees—James Triplett and Alfred Kemp, Sr.—received approximately 88% of all temporary-upgrade hours during the pre-Grizzard period; in the post-suit period, one white employee—Robert Haynes, Jr.—and one black employee—Arthur Perry—received approximately 94% of all temporary-upgrade hours. The plaintiffs introduced no evidence demonstrating that other individuals desired or were qualified for temporary-upgrade positions.[37] Consequently, we have nothing with which to compare the plaintiffs' statistics. As a result, the statistics are meaningless.[38]

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[37]For example, the plaintiffs did introduce evidence pertaining to the qualifications of Thomas Hardy and Daniel Anderson, Jr. for temporary upgrade assignments. These two individuals, however, were not qualified for such assignments. *See* part VIII.D *infra.*

[38]The plaintiffs' statistics regarding the number of rack-maintenance temporary-upgrade hours worked by blacks suffer from the same problems. For example, out of the three employees given temporary upgrades in the pre-Grizzard period, a white employ-

(continued...)

Other evidence supports the district court's determination that D & L did not discriminate in giving employees temporary upgrade assignments. For example, the percentage of blacks in permanent craft positions during the Grizzard years ranged from 66.7% to 73.7%. During the immediately preceding years, blacks comprised 57.1% to 63% of the employees in craft positions.[39] Moreover, D & L during the Grizzard years awarded seven out of the eight permanent promotions to craft positions to black employees. Moreover, Alfred Kemp, one of the black employees who received no temporary upgrades during the Grizzard pre-suit period but did during both the pre-Grizzard and post-suit periods, testified unequivocally that D & L was a good place to work and always treated him fairly.[40] We also note the lack of evidence regarding the number of employees, black and white, who received temporary upgrades to craft positions in non-maintenance departments. *See Wards Cove,* 490 U.S. at 651-53, 109 S.Ct. at 2122 (noting that plaintiffs should not unnecessarily segment the

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[38](...continued)
ee—Willie Mullen—worked approximately 82% of the total hours. In the Grizzard pre-suit period, one white employee—Edward Otto—worked 100% of the hours. In the post-suit period, one black employee—Alfred Kemp, Sr.—received 95% of the temporary upgrade hours.

[39]The 1980 census figures for Bolivar County indicate that blacks held only 33.4% of all precision production craft and repair positions county-wide.

[40]Howard Watson, who had to approve Kemp's availability for temporary assignments, supplied a legitimate, nondiscriminatory reason for Kemp's lack of temporary upgrade assignments during the Grizzard pre-suit period. Watson testified that he sometimes refused to approve Kemp for temporary upgrades because Kemp was needed in a production department.

employer's work force in an attempt to prove discrimination). We therefore agree with the district court's conclusion that D & L did not discriminate in selecting employees for temporary upgrade assignments in the rack maintenance and general maintenance departments.

VII

The statistical evidence presented by the plaintiffs does not present the gross statistical disparity that, when considered in light of the entire record, would require a reversal of the district court's ultimate findings that no pattern of discrimination existed with regard to D & L's hiring and promotion practices. Nor is the historical and anecdotal evidence introduced by the plaintiffs sufficient to support a finding of disparate treatment. Accordingly, we **AFFIRM** the district court's judgment on the class claims.

VIII

The district judge rejected the individual claims of various plaintiffs challenging the treatment they received pursuant to D & L's hiring, promotion, and termination policies. "In a disparate treatment case involving an individual, the plaintiff initially has the burden of showing a prima facie case of discrimination." *Carroll,* 708 F.2d at 195. A plaintiff meets this initial burden by demonstrating

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applica[tions] from persons [who possessed the plaintiff's] qualifica-

tions.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. If the plaintiff establishes a prima facie case of discrimination, "the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Carroll,* 708 F.2d at 195. If the employer "carries this burden of production, the presumption raised by the prima facie case is rebutted" and drops from the case. *Burdine,* 450 U.S. at 255 & n. 10, 101 S.Ct. at 1095 & n. 10. "The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race was." *St. Mary's,* --- U.S. at ----, 113 S.Ct. at 2747 (quoting *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095). The plaintiff at all times bears the burden of persuading the court that he or she was the victim of intentional discrimination.[41] *Id.* --- U.S. at ----, 113 S.Ct. at 2747-48.

A

A number of individual plaintiffs claim that D &

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[41]"When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* ritual is unimportant. We focus our inquiry on whether the record contains evidence upon which a reasonable trier of fact could have concluded as the jury did." *Molnar v. Ebasco Constructors, Inc.,* 986 F.2d 115, 118 (5th Cir.1993) (citation omitted).

L unlawfully discriminated against them on the basis of race by refusing to give them applications during the Grizzard years—October 1982 through April 1986. The district court found that some of the plaintiffs were not credible because, during the time they allegedly could not obtain applications, other blacks were given applications.[42] Furthermore, the district court found that D & L properly refused to give many of the plaintiffs applications because the Company either was not hiring when the plaintiffs were seeking applications or was hiring but had already received a sufficient number applications for the positions to be filled. The district court's findings are not clearly erroneous. An extensive review of the record has convinced us that it contains no evidence indicating that the plaintiffs were not given applications because of their race.[43] The only evidence supporting the plaintiffs'

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[42]For example, plaintiff Chris Harris testified that she and two other blacks were able to obtain applications in October 1984. Plaintiff Linda Davis testified that although she was not able to procure an application, her sister and another person obtained applications. Plaintiff Bobbie Sharp testified that while she was not able to obtain an application in mid-1984, she did obtain an application from D & L in mid-1983; Sharp also testified that on the latter occasion, she saw other blacks filling out applications. Thomas Hardy, a D & L employee, testified that his wife procured an application from D & L in 1984, while Malcolm Smith testified that he obtained an application October 2, 1982 and was hired the next month. Kimroy Williams, a D & L employee, testified that three of his relatives applied for employment with D & L during the Grizzard years.

[43]The plaintiffs also complain that the application procedures instituted by Haynes when she became personnel manager—making all applicants come to the plant, refusing to allow employees to take blank applications home with them—were intended to harm potential black applicants. However, D & L demonstrated that it had legitimate, nondiscriminatory reasons for changing the application

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allegations that D & L refused to give blacks employment applications is the plaintiffs' unsupported assertions concerning their collective belief that D & L discriminated against blacks.[44] Under D & L's application policy, *see* part I.A *supra*, there were legitimate, nondiscriminatory reasons why D & L did not give applications to the plaintiffs. Because the plaintiffs failed to demonstrate that race was the true reason for D & L's refusal to give them applications, we uphold the district court's finding that D & L did not discriminate against the plaintiffs. *See Odom v. Frank*, 3 F.3d 839, 849 (5th Cir.1993) (holding that anecdotal evidence and mere speculation will not support a finding that an employer followed an unwritten "policy" of discrimination); *Carroll*, 708 F.2d at 195-96 (noting that the mere suspicion of discrimination is not sufficient to establish disparate treatment).

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[43](...continued)
process. For example, Haynes testified that when she allowed employees to take applications from the plant, many were never returned. She also stated that making potential employees come to the plant to obtain and complete applications helped to ensure that the people applying actually wanted the job, had transportation to and from the plant, and could read and write. The district court credited her testimony, and this finding is not clearly erroneous.

[44]For example, although Miller Slaughter testified that D & L did "a lot of discriminating," she would not consider a company that has a large percentage of black employees to be acting discriminatorily. Melvin Shaw testified that he was discriminated against simply "because [he] knew [he] was qualified to work [at D & L] but ... didn't even receive an application." Moreover, the plaintiffs uniformly testified that neither Haynes nor D & L's security guards treated them in a harsh manner or directed derogatory or vulgar language at them.

B

Plaintiffs Chris Harris and Bobbie Sharp contend that D & L unlawfully discriminated against them on the basis of race by refusing to hire them for production positions. The district court found that D & L did not hire Harris and Sharp for valid, race-neutral reasons. For example, Harris, who applied when D & L was hiring only for the night shift, indicated on her application that she attended afternoon and evening classes at a local college. Haynes testified that she believed she did not hire Harris because of the conflict between Harris's classes and the shift for which she was hiring. The district court noted that although Haynes's explanation was not absolute, no evidence suggested that race affected Haynes's decision not to hire Harris. This finding is not clearly erroneous. *See Odom,* 3 F.3d at 845 ("Although Strader's testimony ... was less than absolute, it constituted at least *some* evidence. More significantly, it was uncontradicted. As Odom adduced *no* evidence favorable to his position ..., we are compelled to accept Strader's legitimate, non-discriminatory explanation...."); *cf. St. Mary's,* --- U.S. at ---- n. 5, 113 S.Ct. at 2751 n. 5 ("The notion that every reasonable employer keeps 'personnel records' on people who never became personnel, showing *why* they did not become personnel (*i.e.,* in what respects all other people who were hired were better) seems to us highly fanciful—or for the sake of American business we hope it is."). Likewise, Sharp failed to adduce any evidence indicating that D & L unlawfully considered her race when deciding not to hire her. Moreover, at the same time Harris and Sharp were not hired, D & L hired other blacks as production workers. Thus, the district court's finding that D & L did not discriminate against her is not clearly erroneous. *See Carroll,* 708 F.2d at 195 (noting that the mere suspicion of discrimination does "not establish disparate treatment").

Plaintiffs Nathaniel Cannon, Michael O'Neal, and Gregory Townsend contend that D & L unlawfully discriminated against them by refusing to rehire them after they had been laid off.[45] The district court found that these plaintiffs adduced no evidence indicating that race was a factor in D & L's decision not to rehire them. In fact, the record indicates that D & L rehired twenty-two blacks, and only fourteen whites, during the Grizzard years. We hold that the district court did not err in finding that D & L did not rehire Cannon, O'Neal, and Townsend because of legitimate, race-neutral reasons. *See Carroll,* 708 F.2d at 195 (noting that the mere suspicion of discrimination does "not establish disparate treatment").

C

Plaintiffs Moses Coleman, Richard Grant, Earnest Hall, Robert Melvin, Alexander Smith, and Kimroy Williams claim that D & L, in failing to promote them to leaders and foremen, discriminated against them on account of their race. The district court found that the plaintiffs failed to demonstrate that race played any part in D & L's failure to promote them. This finding is supported by the record evidence.

In selecting leaders and foremen, D & L considered the employee's attitude, work record, work experience, leadership abilities, willingness to help other employees, commitment to the Company, and seniority to be very important. The record reflects that each plaintiff was lacking in one or more of these attributes during the Grizzard years. *See Davis v. Chevron U.S.A., Inc.,* 14 F.3d

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[45]Cannon, O'Neal, and Townsend were not entitled to be recalled under the terms of D & L's collective bargaining agreement.

1082, 1087 (5th Cir.1994) (noting that to establish a prima facie case of discrimination, an applicant must be qualified for the sought position *at the time* he or she applies for it). For example, Gerald Bardwell, Coleman's supervisor, stated that Coleman, when temporarily filling in for foremen, was unable to handle the job and had employees "goofing off on him." Howard Watson testified that department supervisors never recommended Coleman for promotion. Additionally, both Grant and Hall had both turned down previous offers of promotion to leader positions, indicating a lack of commitment to D & L.[46] Charlie West, a black supervisor, testified that he did not consider Grant for one promotion because he did not know Grant. Byron Kyle, a department superintendent, testified that Grant did not have any leadership abilities.[47] Richard Williams, a black supervisor, and Howard Watson testified that Melvin and Kimroy Williams did not show any interest in being promoted and did only enough work to get by, thereby demonstrating little desire for advancement and no commitment to the Company.[48]

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[46]Hall challenges D & L's assertion that he rejected an offer of a promotion. However, Grizzard and Howard Watson, the production manager at the time, both testified that Hall did turn down a promotion because the promotion would have required Hall to work on the second shift. The district court credited this testimony over that of Hall. This determination was not clearly erroneous. *See Anderson,* 470 U.S. at 574, 105 S.Ct. at 1511-12.

[47]Moreover, Grant admitted that he was not qualified for promotion until 1985. However, he filed an EEOC charge in 1984 alleging that D & L failed to promote him for discriminatory reasons. Grant explained this inconsistency by stating that he did not read the EEOC charge before he signed it and thus had no idea what the charge alleged.

[48]After D & L noticed a change in Williams's attitude in 1987, the Company promoted him.

Tommy Lucas, a foreman in the paint department and former union steward, testified that Smith had an attitude problem.

The plaintiffs failed to demonstrate that their race played any role in D & L's failure to promote them. *See Carroll,* 708 F.2d at 196 (rejecting a claim that an employee was discriminatorily denied promotion because his supervisors testified that his attitude and lack of dependability were the actual reasons); *Pouncy,* 668 F.2d at 795 (rejecting an employee's promotion claim because the employee did not possess the initiative or the ability to communicate with and train his co-workers). At most, the plaintiffs proved that D & L may have overlooked one or more of them when considering potential candidates for promotion. Such a showing is insufficient to prove discrimination. *Cf. Odom,* 3 F.3d at 849-50 (noting that the perpetuation of a "good old boy" network does not amount to racial discrimination). Accordingly, the plaintiffs failed to prove that D & L did not promote them on account of their race.

D

Daniel Anderson, Jr. and Tommy Hardy argue that D & L refused to give them temporary upgrade assignments in the general maintenance or rack maintenance departments because of their race. Welding experience was necessary for many of the tasks performed by general maintenance employees, and welding was the primary duty of rack maintenance employees. The district court found that D & L did not give Anderson and Hardy temporary upgrade assignments because they lacked the necessary experience to work in the maintenance departments.

Both Anderson and Hardy testified that they had

only a limited amount of welding experience.[49] Moreover, they presented no evidence demonstrating that what little welding experience they had qualified them to perform the duties of general and rack maintenance employees. Finally, they introduced no evidence suggesting that any white employee who received an upgrade was unqualified (or less qualified than the plaintiffs). Because the district court's finding that Anderson and Hardy were not qualified to receive temporary upgrades is not clearly erroneous, the district court's conclusion that Anderson and Hardy failed to establish a prima facie case of discrimination is supported by the evidence.

Anderson further contends that D & L discriminated against him by not permanently promoting him to the rack maintenance department. Anderson and James Bruce, a white employee, submitted bids for a permanent rack maintenance position. Both Anderson and Bruce were interviewed. The notes of the interviewer indicated that he considered Anderson's limited welding experience, Bruce's more extensive welding experience, Anderson's "poor attendance," and Bruce's "very good" attendance in determining who to recommend for the promotion.[50] Moreover, the notes also indicate that a black employee with more seniority than Bruce turned down the job.

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[49]Hardy testified that he had done some welding in an auto body shop and took high school welding classes in the early 1970s. Anderson also admitted that he had little welding experience, although he had taken "mechanics" classes in high school.

[50]The plaintiffs, without citing any authority, contend that the district court erred in relying on these notes because the interviewer never testified. However, the notes were attached as an exhibit to a joint stipulation submitted to the court by both parties. Because the stipulation stated that both it and the attached "exhibits shall be received in evidence at the trial of this case," the plaintiffs' contention is without merit.

Thus Anderson did not establish a prima facie case of discrimination because he was not qualified for the promotion which he sought.[51] Moreover, even if Anderson did establish a prima facie case, D & L demonstrated by a preponderance of the evidence that it rejected Anderson for legitimate reasons. Accordingly, the district court properly found that Anderson failed to demonstrate that he was the victim of discrimination.

E

Four plaintiffs—Belinda Cox, Robert Haywood III, Synovia Jackson and Jesse Overstreet—contend that the district court erred in finding that D & L did not discharge black employees under its garnishment policy, *see* part I.D *supra,* in retaliation for filing EEOC charges.[52] To establish a prima facie case of retaliatory discharge under § 2000e-3(a) of Title 42,[53] a plaintiff must demonstrate (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action

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[51]Anderson also argues that he had experience "fixing" D & L machines and therefore was qualified for the promotion. However, Wallace Bailey, the maintenance department superintendent, testified that Anderson's experience "fixing" machines simply involved routine preventive maintenance duties performed by all D & L employees and was not similar to the duties performed by maintenance department employees.

[52]The plaintiffs do not appeal the district court's conclusion, based on our holding in *Carter v. South Central Bell,* 912 F.2d 832 (5th Cir.1990), *cert. denied,* --- U.S. ----, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991) that their claims of retaliatory discharge were not actionable under § 1981.

[53]This section prohibits an employer from "discriminat[ing] against any of his employees ... because [the employee] has made a charge ... under this subchapter." 42 U.S.C. § 2000e-3(a).

occurred, and (3) that a causal link between participation in the protected activity and the adverse employment decision exists. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir.1992). Once a plaintiff establishes a prima facie case, the employer bears the burden of articulating some legitimate, nondiscriminatory reason for its action. *Id.* If the defendant does so, the employee bears the ultimate burden of showing that the reasons given by the employer were a pretext for retaliation. *Id.*

The parties appear to agree that the plaintiffs passed the first two prongs of the retaliation test, as they filed EEOC charges and subsequently were terminated from their positions.[54] They disagree, however, about the causal link between their terminations and the filing of the EEOC charges. The plaintiffs argue that but for the filing of the EEOC complaints, they would not have been fired. D & L counters by arguing that there is no causal connection between the plaintiffs' terminations and their protected activities. D & L further argues that even if the plaintiffs did establish a prima facie case of retaliation, it articulated a legitimate, nondiscriminatory reason for their discharges—violations of the garnishment policy.

The district court found that the plaintiffs failed to show a causal connection between the filing of the charges and their terminations. The district court further found that the evidence demonstrated legitimate, nondiscriminatory reasons for the plaintiffs' terminations—violations of the garnishment policy. These findings are not clearly erroneous. It is undisputed that

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[54]Haywood did not file EEOC charges, but his father did.

the plaintiffs did in fact violate the garnishment policy.[55] Because the penalty for such a violation was termination, D & L properly terminated the plaintiffs. *See Lewis,* 750 F.2d at 1279 (holding that when some evidence substantiates a claim of retaliation while other evidence demonstrates that the employer acted for innocent reasons, the district court did not clearly err in rejecting the retaliation claim).

The plaintiffs argue their terminations are causally related to their protected activity because D & L did not discharge other employees who violated the garnishment policy if those employees or their relatives had not filed EEOC charges. The plaintiffs point to seven individuals whom they argue should have been discharged under the policy but were not. Six of the individuals named by the plaintiffs, however, did not violate the garnishment policy.[56] Moreover, the mere fact that one individual

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[55]Jackson argues that D & L terminated her one day before the 30-day grace period for her fourth garnishment expired. Haynes, however, testified that she measured the grace period monthly—i.e., if an employee was notified of a garnishment on the fifth day of one month, the grace period expired on the sixth day of the following month. Thus, while the grace period usually was 30 days, in some instances it actually was either 29 or 31 days. Because Jackson was notified of her fourth garnishment on February 12, 1985 and fired on March 13, her termination was totally consistent with D & L's customary application of the garnishment policy.

[56]The plaintiffs contend that D & L would have discharged Charles Daniels, Larry Drake, Hazel Lofton, Alice Stapleton, Larry Wesley, and Eddie Williams had the garnishment policy been applied nondiscriminatorily. However, the district court found that Daniels did not violate the policy because Haynes, in applying the policy, did not count garnishments that employees received before she became personnel manager; Drake, Lofton, and Williams did not violate the

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violated the policy without being fired, does not by itself amount to race-based discrimination. *See Lewis,* 750 F.2d at 1278 n. 19 (finding that irregular exceptions to a valid policy did not support a retaliation claim); *cf. Odom v. Frank,* 3 F.3d 839, 850 (5th Cir.1993) (noting that "misfeasance, malfeasance, or nonfeasance—without nexus to ... race—is not actionable"). Furthermore, contrary to the plaintiffs' contention, the evidence indicates that D & L discharged under the garnishment policy other black employees who had not filed EEOC claims.[57] Additionally, the plaintiffs presented no evidence suggesting that D & L did not discharge white employees who violated the policy. Consequently, the district court did not err in finding that no causal link existed between the filing of the EEOC charges and the plaintiffs' discharges. We therefore uphold the district court's finding that D & L

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[56](...continued)
policy because the thirty-day grace period for the fourth garnishment extended over two years beyond the date that they received their first garnishment; Williams did not violate the policy because his fourth garnishment was released before the end of the thirty-day grace period; Stapleton filed a bankruptcy petition, which barred D & L from counting the garnishments against her; and Wesley did not violate D & L's garnishment policy either because Haynes did not count garnishments received before she became personnel manager or because Haynes simply misapplied the policy. After reviewing the record, we have determined that these findings are not clearly erroneous. Moreover, Lofton was the sister of Robert Melvin, who not only filed EEOC charges but was a named plaintiff in this suit. This fact is wholly inconsistent with the plaintiffs' contention that D & L discharged under the garnishment policy only those black employees who filed EEOC charges themselves or had close relatives do so.

[57]D & L discharged Lester Archie, James Humphrey, and Jimmie James for violations of the garnishment policy. Moreover, D & L discharged Humphrey on the same day that it discharged plaintiff Belinda Cox.

did not discharge the plaintiffs in retaliation for their participation in protected activity.

IX

The plaintiffs failed to produce sufficient evidence demonstrating that D & L engaged in any race-based discrimination. Accordingly, we **AFFIRM** the judgment of the district court in all respects.

JOHNSON, Circuit Judge, dissenting in part:

The facts here clearly show that there have been scores of individuals who have endured racial discrimination at the behest of Douglas and Lomason ("D & L"). Many of these individuals have been pressured by the president of the company to drop this cause of action "for the good of the company." Instead of bowing to the company president's threats of closing the plant and laying off hundreds of people because of this lawsuit, the plaintiffs have stood up for what they believed to be their rights to equal employment. Despite a plethora of evidence which seems to overwhelmingly support the Plaintiff's contentions, the district court found that no racial determination occurred. The majority affirms. After carefully reviewing the record, this writer is constrained to dissent.

A. Disparate Impact in Hiring

1. The Law

The most appropriate place to begin an analysis of disparate impact claims is the law. The seminal disparate

impact case, *Griggs v. Duke Power Co.*, explained that Congress' objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. 424, 429-30 (1971). The Court went on to determine that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158. According to the Court, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432, 91 S.Ct. at 854.

The Court elucidated the proof requirements for disparate impact cases in *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). It ruled that for a Title VII plaintiff to successfully present a disparate impact claim, he or she must point to a particular employment practice that has created such disparate impact. *Id.* at 657, 109 S.Ct. at 2124-25. The plaintiffs in *Wards Cove* alleged that the practices in question were, *inter alia,* nepotism, the creation of separate hiring channels, the practice of preferential treatment in rehiring, and the use of subjective decision making. *Id.* The Supreme Court concluded that the plaintiffs had properly presented a disparate impact claim by pointing to such practices which, if proved, would support a finding of racial discrimination. *Id.*

2. Alleged Discriminatory Employment Practices

In the instant case, the district court concluded that Plaintiffs had failed to identify which of D & L's

employment practices adversely impacted African Americans. The majority asserts that the Plaintiffs did, in fact, identify an employment practice—namely, D & L's policy which requires applicants to complete applications at the plant. However, the majority asserts that such a practice could not justify resort to the disparate impact theory. Maj. slip op. at 4792.

The record belies the conclusions of both the majority and the district court. The pretrial order, signed by the district court, agreed to by counsel for each party, and filed just over one month prior to the trial, states plainly, "Plaintiffs allege that the defendant company has discriminated against blacks in hiring, both by restricting access to application forms and by failing and refusing to hire those blacks who are permitted to fill out application forms on the same basis as whites who fill out application forms." R. at 2590. Restricting access to application forms and using different hiring standards for blacks, as opposed to whites, are both employment "practices" which justify the application of the disparate impact theory to the facts of this case.

3. Anecdotal Evidence

The majority "found" that the "record contains no evidence indicating that D & L's application procedures affected potential black applicants any differently than potential white applicants." Maj. slip op. at 4793. Reading the record reveals otherwise. The record quite readily shows that D & L's application procedures almost exclusively affected blacks. D & L's expert, Dr. Joan Haworth, testified that the hiring practices initiated by Patty Haynes—specifically the restriction of application forms—caused "wild fluctuations" in the percent of black

applicants who were hired.[1] The defense "hung its hat" on this explanation. In its argument to the district court during its Rule 41 motion, D & L's attorney contended that Patty Haynes' change in the hiring procedures *alone* was enough to cause the change in the proportion of black hires from the pre-Grizzard era.

D & L's—and Plaintiffs'—contention that Ms. Haynes practice of restricting access to application forms caused the changes in black hires at the Cleveland plant is completely substantiated by the record.[2] D & L and Plaintiffs introduced into evidence dozens of depositions of black individuals who had attempted to obtain, but who were refused, applications from D & L when the company was hiring. Many of the deponents identified black friends and/or family members who were also denied the opportunity to file applications.[3] In all, Plaintiffs identified more than fifty blacks to whom D & L refused

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[1]Prior to James Grizzard's arrival at the Cleveland plant, 64.6% of those hired for general factory jobs at D & L were black. When Mr. Grizzard became plant manager, that number dropped to 46.5%. After Mr. Grizzard left, the black hires rose to 61.1%.

[2]Even the district court recognized that Patty Haynes' employment practices may have adversely affected blacks. In discussing the fact that the percentage of black hires dropped significantly during the Grizzard years, as compared with the pre-Grizzard years, the court concluded, "Finally, plaintiffs' analysis in this instance fails to take into consideration the difference in the practices and procedures initiated by Ms. Haynes which were in effect during the Grizzard years and differed substantially from what was done by her predecessor." Op. at 18-19.

[3]The district court correctly recognized that these statements are hearsay in nature. However, it neglected to recognize that D & L never objected to the introduction of the depositions on that basis or on *any* basis.

applications. The vast majority of these people attempted to obtain applications numerous times. Many of them asserted that they became discouraged and stopped trying to obtain applications. Further, there is no dispute that a great number of them sought to apply for jobs at D & L when the company was hiring. Reviewing this evidence, the majority properly claims that "the black individuals turned away at the *gate* by D & L guards never saw D & L give any applications to whites seeking employment." Maj. slip op. at 4793 (emphasis added). However, that finding probably provides little comfort to the blacks who testified that they not only saw whites obtaining applications, but also saw whites being *hired* at the same time that blacks were being turned away in the *personnel office*—as opposed to the *gate.*[4]

One would think—and the law certainly requires—that the restriction of applications would impact on whites equally. However, such is far from the case here. As compared to the two and one-half score blacks who were refused applications, D & L presented the

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[4]For example, J.C. Evans, a black man, stated that he followed Bobby Jolly, a white school mate, into the personnel office. He saw Patty Haynes talking to Jolly and a group of approximately ten other white individuals. Mr. Evans could not hear what Ms. Haynes told the white applicants. However, as Jolly started to leave the area, he passed Evans and informed Evans that he, Jolly, had been hired. Patty Haynes told Evans to come back the next day. He left without an application, and when he returned the following day pursuant to Ms. Haynes' instructions, he was told that the company was not hiring.

Likewise, Ms. Lizzie White, a black woman, explained in an affidavit that she visited the personnel office at the same time that Teresa Boswell, an acquaintance who was white, visited the office. Ms. Boswell not only obtained an application, but she was also hired the same day. Ms. White was turned away without an application.

resounding number of *three* whites who had been refused applications. Although dozens of blacks sought to obtain applications while the company was hiring, not one of the white potential applicants sought an application during such periods.

4. Statistical Evidence

a. The Law

The disparate impact model usually focuses on statistical analysis. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 987, 108 S.Ct. 2777, 2784-85, 101 L.Ed.2d 827 (1988). Statistical data is probative, however, only if it properly compares relevant elements. *See Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Wards Cove,* 490 U.S. at 651, 109 S.Ct. at 2121 (quoting *Hazelwood,* 433 U.S. at 308, 97 S.Ct. at 2741-42). However, where labor market statistics are impossible to ascertain, the Supreme Court has recognized that "certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose." *Id.*

b. The Facts

All agree that the best comparison in this case would be the racial composition of the applicant flow into D & L for general factory jobs as compared with the racial composition of the general factory hires. The district court found that such a comparison is possible. The majority found no clear error in that finding. Both are wrong.

Fewer than two years after the filing of this lawsuit, Patty Haynes testified during a deposition that she started to retain all of the applications after she learned that some employees filed EEOC charges in October of 1984. She explained that she threw away a number of applications just prior to that time, and she was not sure whether she also threw away some of the applications which were filed during the five months preceding the filing of the EEOC charges.

Statistics, which D & L did not dispute, confirm that Ms. Haynes failed to retain all of the applications. Ms. Haynes testified, and the district court found, that she, as a general rule, would accept twelve to fifteen applications per seven hires. This was a fairly constant practice, and once she adopted this practice, she did not deviate therefrom throughout her tenure as personnel manager. The application data which exists after the EEOC charges were filed (October 17, 1984) are consistent with Ms. Haynes' explanation of her practice: Of the applications on hand, almost forty percent came from unhired applicants. Hence, for every six hires, Ms. Haynes was able to consider ten applicants. The application information for the period prior to the filing of the EEOC charges presents a vastly different picture. Of the applications on hand which were filed prior to October 17, 1984, only twenty-two percent were filed by unhired applicants. Contrary to Ms. Haynes' explication of her practice of accepting twelve to fifteen applications per seven hires, and contrary to the district court's acceptance of that explanation, Ms. Haynes would have been required to hire four people out of every five applicants throughout that period.

The difference in the applications is not only substantial, but it is also statistically significant. Dr. Charles Mann, a statistician, testified—and D & L did not

dispute—that all things being equal—and according to Ms. Haynes, all things *were* equal—there were only four chances in *one thousand* that all of the applications existed.[5] Dr. Mann's calculation reveals that Ms. Haynes' uncertainty about her retention of all of the applications was well-founded.[6]

Even if all of the applications were available—and they clearly are not—reliance on the applications would be inappropriate in light of the fact that the company disproportionately restricted black potential applicants' access to the forms. Barriers and/or practices which deter qualified minorities from applying for jobs impermissibly taints any analysis which employs the use of actual applicant-flow data. *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) ("The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying" because of the alleged discriminatory practices); *see Ward's Cove*, 490 U.S. at 653, 109 S.Ct. at 2122-23 ("*As long as there are no barriers or practices deterring qualified nonwhites from applying* ... if the percentage of selected applicants who

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[5]Notably, when she testified in a sex discrimination case prior to the trial of this case, Dr. Haworth performed a similar analysis which determined the existence of all applications for a certain period of time.

[6]Dr. Haworth, who had no personal knowledge of the retention of the applications, was the only witness to claim that all of the applications existed. However, she spoke with great diffidence. *See, e.g.*, Trans. Vol. 22 at 1714-15 ("For that period of time [of May 4, 1984 through January, 1985] I have the applications of the nonhired people and the applications of the hired people, as far as I can tell *to the extent that they exist.*" (emphasis added)); *Id.* at 1718 ("[T]hese are the pools for which I *believe* I have the nonhired applications *to the extent that they're available.*" (emphasis added)).

are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." (emphasis added)). In light of D & L's restrictions on blacks' attempts to obtain applications, the true applicant-flow information cannot form the basis of the statistical analysis in this case.[7]

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[7]Dr. Haworth's statistical analysis is infirm for a number of other reasons, as well. First, when cross-examined by Plaintiffs' counsel, she admitted that she excluded 11 applications which were undated. (Failing to date an application was not fatal. Patty Haynes hired several people who forgot to place the date on their application.) Nine of those applications came from blacks. Additionally, Dr. Haworth included the application of a white person who sought a general maintenance mechanic position, not a general factory position—the position at issue here. Finally, in her statistical analysis of D & L's hiring practices for 1984, Dr. Haworth excluded the October-November hiring period. She claimed that the white applicants in that period had greater blue collar and/or manufacturing experience than the black applicants. Patty Haynes, however, testified that prior plant production experience—which *none* of the white applicants possessed—not blue collar or manufacturing experience, was beneficial for applicants seeking general factory work at D & L. The district court did not adopt this rationale. It was correct in so doing.

The district court erred, however, in substituting its own rationale for the exclusion of the October-November applications. The court reasoned that because blacks began to file EEOC charges of racial discrimination in October 1984, the black community conspired to flood D & L with applications of black individuals so as to increase the black proportion of the applicant flow. The court's reasoning has no basis in logic or in the record.

Initially and importantly, the Supreme Court has discommended courts' supply of explanations for statistical disparities when those explanations neither have support in the record nor constitute

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[7](...continued)
valid judicial presumptions. *See infra* note 13; *see also Castaneda v. Partida*, 430 U.S. 482, 500, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Speculative inferences and suppositions proffered by courts, as opposed to parties, are improper and impermissible. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 619, 621, 94 S.Ct. 1323, 1332-33, 1333-34, 39 L.Ed.2d 630 (1974).

In this case, the court's explication of its rejection of the October-November data finds absolutely no support in the record. There is no testimony, no suggestion, no intimation in the record which remotely implies that numerous blacks applied for jobs at D & L to affect applicant-flow data. There is not even a suggestion that a greater proportion of blacks than normal applied for general factory positions in October 1984. In fact, when specifically informed about the number of applications filed by blacks and whites in October 1984 and her selection rate of those applicants, Ms. Haynes testified during her 1987 deposition that she knew no reason other than race for the disparity in hiring. Mr. Grizzard similarly testified in his deposition that he knew of no reason why the hiring rates for October 1984 were so favorable toward whites. Dr. Haworth testified that the EEOC investigation of D & L did not make the October 1984 applicant-flow data unreliable. She specifically stated that those numbers should *not* be discarded because the EEOC had been brought into D & L hiring matters. Finally, Dr. Haworth testified that the applicant-flow data did not "fluctuate wildly" in 1984. The availability of blacks, according to Dr. Haworth, was constant.

The district court's explication for his rejection of the October 1984 applications—that once blacks heard of the charges of discrimination at D & L, they flocked to apply for positions with the company—is also illogical. Among other things, the district court's explanation assumes that the black applicants—people who applied for jobs which did not even require a high school education—understood that in proffering statistical proof in a disparate impact case, plaintiffs would want to have a greater minority presence in the applicant flow. According to the district court, Oliver Robinson, a man whom both parties stipulated was a paranoid schizophrenic, encour-
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Hence, the district court should have resorted to appropriate proxy information, which the Supreme Court has declared to be "equally probative." *Wards Cove,* 490 U.S. at 651, 109 S.Ct. at 2121-22.

Plaintiffs proffered seven different standards of availability which served as a proxy for the actual applicant-flow information. Four of those standards were particularly persuasive: 1) the Mississippi State Employment System ("MSES") referrals to D & L for 1985, 2) the fully registered persons with MSES,[8] 3) the number of general factory hires during the four and three-quarter years preceding Mr. Grizzard's arrival, and 4) the number of people in Bolivar County who are were [sic] employed as operators, fabricators, and laborers in factories other than D & L, as shown by the 1980 census.[9]

The first standard contains all of the application forms of all interested D & L applicants during the time

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[7](...continued)
aged blacks to apply so as to skew the applicant flow. These unsupported suppositions assume way too much, and in my view constitute clear, indeed patent, error.

[8]This standard excluded any individuals who were younger than 18 years old and who had any one of seven characteristics which might imply that they were not genuinely interested in employment. Individuals were excluded if they received welfare benefits or Food Stamps, if they were applying for Food Stamps, if they were in the WIN Project or the Summer Youth program, if they were migrant workers or had previously been coded as a migrant worker, or if they were receiving unemployment insurance.

[9]My first and second relevant standards correspond to the Plaintiffs' and the district court's second and third standards of availability. My third and fourth standards correlate to their sixth and seventh standards.

period in issue which were on file with MSES. This standard is untainted by unfair restrictions on blacks' ability to obtain such applications.[10] The district court rejected this standard because it was "an extremely small sample." Interestingly enough, however, the court credited Dr. Haworth's statistical analysis of her "pools" of applications, and each such pool was smaller than the pool in this first standard.[11] The district court's rejection of this standard is directly antithetical to its acceptance of Dr. Haworth's pools. In this writer's view, it is clearly erroneous. Furthermore, this standard provides a reliable barometer of the general D & L applicant flow during the periods in question. Indeed, Dr. Haworth, herself, testified that this standard, though not perfect, was valid.[12] The proportion of black applicants in this standard was 65.6%. When compared with the actual number of blacks hired, the standard showed statistical significance at 8.8 standard deviations.[13]

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[10]According to some black deponents, MSES would not permit them to file D & L applications. However, the MSES restrictions, though apparently only affecting blacks, are, in no way, as pervasive as D & L's restrictions.

[11]MSES referred 92 applicants to D & L. However, the largest application pool which Dr. Haworth analyzed contained 80 applicants. The second largest pool contained just 57 applicants. The other pools, in descending order contained 48, 43, 42, and 18 applicants.

[12]Although she had trouble including certain MSES referrals ("OJT's") in the pool, Dr. Haworth testified that she was *not* recommending that the OJT referrals be excluded from this standard.

[13]The Supreme Court has reiterated numerous times that standard deviations greater than two or three suggest suspect activity. *See Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977); *Hazelwood*, 433 U.S. 299, 312 n. 17, 97 S.Ct. 2736, 2743-44 n. 17, 53 L.Ed.2d 768 (1977).

The district court rejected the second standard, claiming that this standard is "heavily weighted" in favor of blacks because of their over-utilization of MSES. Dr. Haworth testified that a national study indicated that blacks in large urban areas generally are more likely to use public employment services than whites. She tempered her testimony with the caveat that she did not know whether this study was applicable to Bolivar County, which is small and rural. Dr. Haworth never claimed that the difference in the usage of public employment services between blacks and whites was statistically significant or even substantial. She did, on the other hand, testify that there might be only a trivial difference, or even no difference, in the usage of MSES by blacks and whites in Bolivar County.

Dr. Mark Bendick, Plaintiff's labor economist, testified that a study on the usage of public employment agencies in southern, rural areas—including Sunflower County, Mississippi, a rural county which is adjacent to Bolivar County—revealed that the public employment service usage in southern, rural areas is quite different from such usage in large urban areas. While the study did not compare blacks' and whites' usage of employment services in rural areas, Dr. Bendick testified that no study shows that rural blacks use unemployment services at a disproportionately higher rate than rural whites. The district court had no evidence contrary to Dr. Bendick's testimony on this subject, for the company did not even attempt to dispute the testimony. The district court's conclusion that the second standard is "heavily weighted" in favor of blacks due to their "over-utilization" of MSES is therefore highly speculative and is not supported by the record. In light of the Supreme Court's disapproval of a court's supply of explanations of statistical information

which is not supported by the record,[14] this Court should not countenance the judicial activism by the district court. No sufficient reason exists in the record—or otherwise, for that matter—for rejecting the overall MSES registrant information. This, the second standard of availability, reveals that 65% of the MSES registrants who were over eighteen and had none of the earlier-described characteristics were black—just six-tenths of one percent smaller than the proportion of blacks in the first standard. This

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[14]In Title VII cases, the Supreme Court has consistently required parties, district courts, and circuit courts to base their decisions upon credible evidence or arguments which exist in the record. *See, e.g., Mayor of Philadelphia,* 415 U.S. at 619, 621, 94 S.Ct. at 1332-33, 1333-34 (noting that the circuit court's explanations constituted "supposition" and "speculative inference" which could not support a serious charge); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 438 n. 23, 95 S.Ct. 2362, 2382 n. 23, 45 L.Ed.2d 280 (1975) (asserting that a defendant's job relatedness claim "cannot be proved through vague and unsubstantiated hearsay").

In *Castaneda,* the Texas Court of Criminal Appeals proffered a theory which explained away a criminal defendant's charge of discrimination in grand jury selection practices. The Supreme Court rejected the State court's theory, deciding that even though the theory was generally applicable, the record was inadequate to support the use of the theory. The Court concluded that "under the facts presented in this case, the ... theory is not developed fully enough to satisfy the State's burden of rebuttal." The Court chose to rely on the record. *Castaneda,* 430 U.S. at 500, 97 S.Ct. at 1283.

Consistent with these cases, then Justice Rehnquist elucidated in his concurrence in *Dothard v. Rawlinson* that the employer in that case may have had a justifiable reason for employing the alleged discriminatory hiring practice. However, Justice Rehnquist explained that once the burden shifts to the employer, the employer—not the court—must articulate that reason. *Dothard,* 433 U.S. at 340, 97 S.Ct. 2732. In this case, the district court has downplayed Plaintiffs' case with reasons not proffered by the defense.

standard demonstrates statistical significance at 8.5 standard deviations.

The district court ruled that in the third relevant standard of availability, Plaintiffs failed "to take into account the distinct *possibility* that the hiring rate prior to the period beginning October, 1982, *may* indeed have been discriminatory in favor of black applicants." Op. at 18 (emphasis added). Again, the district court improperly supplied reasons for ignoring Plaintiffs' statistical analysis which no party espoused at any time throughout the trial or during depositions. *See supra* note 13.

The court further explained that the differences in Patty Haynes' employment procedures perhaps accounted for the change in employment rates of blacks. The district court's statement of the obvious is actually a recitation of the disparate impact theory. Its attempt to explain away Plaintiffs' reliance upon standard three in fact embraces Plaintiffs' Title VII claim. There is no valid reason for disregarding this standard. Indeed, in light of the district court's back-door recognition that Ms. Haynes' practices may have caused the hiring disparities, there is every reason to consider this standard as a valid reference for a statistical analysis of the disparate impact claim. This third standard, which shows that 64.6% of the hires were black, is just four-tenths of one percent lower than the second standard and equates to 8.3 standard deviations. The consistency of the first three standards is amazing and, in this writer's view, lends greatly to their credibility and probative value.

The final standard, though rejected by the district court, is much more precise than standards accepted by the Supreme Court in *Dothard v. Rawlinson* and *International Brotherhood of Teamsters v. United States.* Those cases compared the make-up of defendants' employees to

the minority presence in the general population. In *Dothard,* the Supreme Court reviewed Alabama's penitentiary system for sex discrimination in hiring. The Court upheld the district court's reliance upon generalized, national statistics which demonstrated that Alabama's hiring system discriminated against women. *Dothard,* 433 U.S. at 329-331, 97 S.Ct. at 2726-28. Similarly, the *Teamsters* Court compared the proportion of minority employees with the proportion of minorities in the general, area-wide population. *Teamsters,* 431 U.S. 324, 337 n. 17, 97 S.Ct. at 1855 n. 17. The Court in *Hazelwood School District v. United States* explained that the *Teamsters* Court's use of general population figures was "highly probative" because the jobs in question were low-skill jobs, which almost everyone in the population could acquire. 433 U.S. at 308 n. 13, 97 S.Ct. at 2741-42 n. 13. The *Wards Cove* Court further explicated that "where figures for the general population might ... accurately reflect the pool of qualified job applicants, ... we have ... permitted plaintiffs to rest their prima facie cases on such statistics as well." 490 U.S. at 651 n. 6, 109 S.Ct. at 2121 n. 6.

The final statistical standard in this case is much more probative than general population statistics,[15] for it hones that number down to the actual number of blacks who are not only in the general population, who are not only in the civilian labor market, but who also are qualified and have shown interest in the general factory-type

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[15]A comparison of the number of black hires at D & L during the Grizzard years with the general Bolivar County population of people who are 16 years and older also reveals statistically significant disparities in the hiring. The analysis reveals a difference which constitutes 4.5 standard deviations.

work at issue in this case.[16] The district court's basis for rejecting this standard finds no support in the record. The court first spurned this standard because it claimed that a comparison between *hired* people and *unhired* people was inherently unreliable. While such a comparison certainly is not perfect, the facts of this case clearly prove that such a comparison greatly favors D & L, not the Plaintiffs, for the unemployment rate among blacks in Bolivar County at all relevant times has far exceeded the unemployment rates of whites in the county.[17] Hence, the proportion of black-unemployed job-seekers would obviously exceed the proportion of black general factory workers.

The District Court also rejected this last standard because not all D & L applicants have prior production-

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[16]It is patently obvious—and even Dr. Haworth acknowledged—that because the black labor force in Bolivar County is heavily weighted in the low-skills jobs and has little presence in the "top rungs" of the employment ladder, the number of blacks eligible for production-worker jobs is much greater than the number of blacks in the Bolivar County civilian labor market. However, even comparison with just the black labor market reveals that there is just a little more than one chance in a thousand that D & L's hiring during the Grizzard years happened by chance—2.4 standard deviations. Dr. Haworth found that a comparison between the labor market and D & L's hiring was probative.

[17]In 1982, 4.3% of the white work force was unemployed. The black unemployment rate approached five times that number: 20.7% of blacks in the county were unemployed. Likewise, in 1984 unemployment rates showed that 4% of the whites were unemployed while 19.9% of the blacks were unemployed.

worker experience.[18] The court noted that many applicants have employment backgrounds in the service or manufacturing industries. While the court's observation is entirely true, it is, at the same time, completely irrelevant to the issue at hand—what proportion of applicants at D & L were black, and hence what is a proper standard of availability for this case. Each applicant, regardless of his or her work experience, displayed interest in general factory work, just as those working in production-type jobs displayed such interest. While a comparison of the number of production workers with the number of applicants to service industry or manufacturing jobs would be unpersuasive—since those interested in the latter jobs might have no interest in the former job—the standard here focuses upon the interest which each person, whether worker or applicant, has shown in *general factory work*, the work at issue in this case. The district court's rationale for rejecting the final standard entirely misses the boat.

The last standard, which to me is completely valid, shows that 70.1% of the employees in general factory-type jobs in Bolivar County, excluding D & L employees, are black. Statistical significance, at 11.3 standard deviations, plainly shows that, like the other standards, the hiring results during the Grizzard years did not happen by chance.[19] Under any of these standards, it seems abun-

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[18]The court disregarded any comparison with the blue collar and manufacturing work force for the similar reason that not all applicants possessed blue collar or manufacturing experience.

[19]Comparison with Bolivar County's civilian labor force (2.4 standard deviations), manufacturing labor force (5.2 standard deviations), and blue collar labor force (6.4 standard deviations) likewise demonstrates statistically significant hiring disparities. Dr. Haworth found such comparisons to be valid.

dantly clear that Plaintiffs have successfully made out a *prima facie* case of race discrimination in D & L's hiring practices.[20]

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[20]Basing her conclusion upon the actual number of remaining applications, Dr. Haworth contended that only 45.5% to 46.7% of the D & L applications came from blacks. The district court accepted these numbers, which should be rejected, not only because the applicant-flow data is incomplete and irrevocably tainted, as earlier discussed, but because the numbers are thoroughly illogical in light of the demographics in Bolivar County.

Although the majority of people in the civilian labor force, the manufacturing labor force, and the blue collar labor force in Bolivar County is black—51.9%, 58.2%, and 60.7% respectively—and only 3% of the professionals and managers in the county are black, the 45.5% to 46.7% range implies that the black labor force in the rural Mississippi Delta County of Bolivar is weighted more heavily at the "top rungs" of the employment ladder than at the bottom rungs. Logic, census data, and even Dr. Haworth, *see supra* n. 16, all agree that the opposite is true.

Dr. Haworth's numbers are not only "out of touch" with the demographics of Bolivar County, but they are vastly different from the applicant-flow data of factories which are in close proximity to D & L. Of the people MSES referred to Colortile for general factory jobs, 68.7% were black. Additionally, 84.4% of the applicants for general factory work in Baxter Travenol, which is located directly across the street from D & L, were black.

Dr. Haworth's data is also inconsistent with Patty Haynes' experience. For example, Haynes testified that on one occasion, she invited everyone to apply for general factory jobs at a mass application distribution. Three to four hundred people stood in the snow on that February 1983 morning to apply for a job. Haynes testified that there were many more blacks than whites; many more than 51% of the applicants were black.

All in all, any comparison between the standard of availability

(continued...)

5. Conclusion

D & L, in essence, conceded Plaintiffs' disparate impact[21] case in hiring by agreeing that the changes Patty Haynes made in her hiring practices—namely, her restriction of application forms—resulted in the significant change in the proportion of blacks hired. Even without such a concession, all credible evidence demonstrates that D & L's hiring during the Grizzard era was discriminatory with respect to race. This Court should therefore reverse on this issue and remand for the district court to decide damages.

B. Promotions

1. Proper Labor Pool

Like the district court's analysis and the majority's review of the hiring data, this writer finds that the analysis

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[20](...continued)
which Dr. Haworth generated and any valid, reliable indicator of the proportion of blacks who showed interest in the production worker jobs at D & L confirm that Dr. Haworth's numbers are wrong. Her analysis should be rejected as fallacious and contrived.

[21]The majority rebuffed Plaintiffs' disparate treatment claim, finding basically no use of racial epithets. Notably, however, the record shows that epithets were, in fact, used by certain management personnel. James Grizzard testified in a deposition, which neither the district court nor the majority read, that he regularly called black employees "boy." Grizzard believed the term to be a friendly one. Patty Haynes testified that she heard blacks complain that Tom Garner, the plant production manager during the Grizzard years, called them "boy." Further, one of D & L's black supervisors testified that he had a foreman who, during the Grizzard years, told racist jokes. The district court and majority apparently ignored this testimony.

and review of the promotion statistics are greatly misleading. The majority, quoting *Lewis v. National Labor Relations Board,* correctly sets forth the proper statistical framework upon which claims of promotion discrimination claims must be based: "In establishing an inference of discrimination from statistical evidence, the 'required comparison [is] to a *qualified* pool of employees *presumptively eligible* for promotion.'" Maj. slip op. at 4798 (quoting *Lewis,* 750 F.2d 1266, 1275 (5th Cir.1985) (emphasis in original)).

Unlike this case, in both *Lewis,* which this writer authored, and *Pouncy v. Prudential Insurance Company of America,* to which the majority refers, there were minimum objective qualifications for promotions which precluded comparison of the proportion of minorities promoted to the proportion of minorities in the overall work force. The promotion pool was smaller than the entire work force. In *Pouncy,* only those employed at level eleven could be promoted to level twenty. *Pouncy,* 499 F.Supp. 427, 454 (S.D.Tex.1980), *aff'd,* 668 F.2d 795 (5th Cir.1982). Similarly, in *Lewis,* only employees who had reached the GS-12 field examiner level or the GS-13 field attorney level were "presumptively eligible" for promotion. *Lewis,* 750 F.2d at 1275. Comparison with the entire work force in those cases was improper, since not all of the employees had reached the required employment level for promotion.

This case is quite different. Here, every production worker is "presumptively eligible" for promotion to the leader positions in question, and every leader is "presumptively eligible" for promotion to the foreman positions in question. There is no educational, skill, or other objective requirement for promotion to those

positions at D & L.[22] With the exception of the attendance record,[23] all of the "qualifications" which the D & L supervisors thought were important were entirely subjective.[24] An unsupported claim that blacks possess

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[22]In fact, James Grizzard—plant manager of the Cleveland plant from 1982 to 1986 and executive manager over two plants at the time of trial—dropped out of high school after the tenth grade and attained a GED thereafter. He did not possess any type of college degree. Indeed, he never even attended college.

[23]Although attendance was a good reason for rejecting blacks for promotion, it apparently was not a sufficient reason for rejecting whites. For example, Plaintiff Richard Grant was purportedly a good worker whom James Grizzard recommended for promotion. According to Robert Goodman, a plant supervisor, Grant had a good attendance record. However, a promotion for which Grant was considered went to Jerry Swinford, a white employee. Swinford had worked at D & L for just 14.6 months at the time of his promotion. During those 14 months, Swinford reported off for sickness 11 times, reported off for personal business six times, came to work late three times, left early twice, and was AWOL once.

Another example is James Bowen, who was hired as a foreman after meeting Mr. Grizzard in the all-white VFW Club. During his eighteen months on the job, Bowen left early or left and returned 19 times and came to work late eight times.

[24]D & L supervisors testified that plant experience and seniority were important considerations for promotion. James Grizzard testified in a deposition that plant experience was a big consideration. Even so, nine people with fewer than five months' experience were promoted to leader during the Grizzard years. Four of the nine had worked at the plant fewer than two months. All nine were white.

Howard Watson and E.W. Tolbert, both supervisors, testified that prior to James Grizzard's arrival, they had never seen such inexperienced people promoted. Wallace Bailey, the assistant supervisor over the maintenance department, testified that he did not

(continued...)

these subjective characteristics at a substantially lower proportion than whites is, in itself, a discriminatory claim in which the district court apparently finds solace.

D & L's entire work force, which was approximately 70% black, is the proper pool to which the promotions

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[24](...continued)
know anyone in the pre-Grizzard period who was promoted without having "some years'" experience as a production worker.

The lack of experience of the leaders and foremen in the plant hurt the productivity of the plant. Soon after James Grizzard arrived, Harry Lomason, president of D & L, wrote Mr. Grizzard to inform him that the quality and manufacturing systems were out of control. In August of 1983, Ford Motor Company informed D & L that it had serious concerns about the quality of work coming from the Cleveland plant. One of the D & L vice presidents wrote D & L plant managers in February 1985 to give them guidance on fixing the on-going quality problems. One of the causes of the plants' problems was "insufficient training or personnel (production and supervision)." Mr. Grizzard testified in his deposition that he did nothing different after receiving this letter. Eight months later, Harry Lomason wrote Mr. Grizzard and three other individuals that D & L's standing and reputation with Ford was "at an all-time low." Mr. Grizzard affirmed that Mr. Lomason's statement was directly applicable to the Cleveland plant. 'Tis notable, indeed, that soon after this letter was written, the supervisors at the Cleveland plant began to promote more experienced workers.

Finally, this writer notes that in computing the number of months' experience of those promoted during the Grizzard years, the majority apparently included the demotion of Larry Vardaman, who had been at the plant for 194.8 months before he was *demoted* from the position of foreman. Vardaman had twice been promoted to foreman prior to Grizzard's arrival. The majority's inclusion of Vardaman in its calculation is erroneous. Absent Vardaman's demotion, the evidence shows that the whites who were promoted during Mr. Grizzard's tenure, indeed possessed an average of approximately 15 months' experience at the time of their promotion.

should be compared,[25] for that is the pool from which promotions came.[26] At no time have promotions approximated 70%. Interestingly enough, however, prior to Mr. Grizzard's arrival at D & L, 63.8% of the promotions went to blacks. That number plummeted to 22.7%[27] during his tenure as plant manager and returned to 63.7% after Plaintiffs filed this lawsuit. When asked why the number of black promotions had declined so drastically, neither Mr. Grizzard nor any supervisor so questioned could offer an explanation.

Contrary to the majority's reliance on the fact that a number of blacks had turned down promotions, Byron Kyle, supervisor over one half of the plant, Howard Watson, production manager for the Cleveland plant, and Charlie Lofton, supervisor over the press area in the plant, all testified that prior to Mr. Grizzard's arrival, blacks and whites turned down promotions. They assert-

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[25]The proportion of blacks at the production-worker level exceeds the proportion of blacks hired in that position. Dr. Haworth and Dr. Bendick explained that a much greater number of whites voluntarily quit their employment with D & L than blacks. Ms. Haynes confirmed this, testifying that many whites quit soon after they are hired. On average, blacks are employed at D & L twice as long as whites. Over time, the longevity difference has resulted in a much higher percentage of blacks in the company than whites.

[26]The district court stated that such a comparison disregarded the company's practice of hiring individuals from outside the plant. However, the district court disregarded Mr. Grizzard's deposition testimony that D & L's practice was to promote from *within* the company.

[27]The district court included salaried supervisors in its review of Plaintiffs' promotion claims. Such inclusion of supervisors is clearly erroneous. Plaintiffs have never claimed that D & L discriminated on the basis of race in promoting supervisors.

ed that the number of people who turned down such promotions did not change during Mr. Grizzard's tenure or after his departure. In fact, a substantial number of blacks who turned down promotions during the Grizzard years had also turned down promotions during the pre-Grizzard years. These employees were repeatedly offered promotions.[28] Based upon such testimony, blacks' rejection of promotions could not be the reason for the stark decline in black promotions. Indeed, no supervisor ever even intimated that such was the case.

2. Comparison With Supervisors in Bolivar County

Dr. Haworth and the district court agree that a comparison of the promotions at D & L with the percentage of blacks in supervisory positions in Bolivar County is more relevant than a comparison of the promotions to the applicable labor pool. It seems to me that such a comparison is highly questionable.

According to Dr. Haworth, most of the supervisory positions to which she compared D & L's promotions were precision craft positions. The "bulk" of those

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[28]Hence, rejection of a promotion clearly did not disqualify an employee from future promotions. In fact, Howard Watson, production manager of the entire plant, testified that after he was first promoted to leader, he requested that he be returned to the production-worker level because he did not think that he could handle the job. He was later promoted again. Possessing one of the highest jobs in the Cleveland plant, Mr. Watson, himself, demonstrated that his rejection of a promotion was not fatal to his promotion opportunities. It should not have been fatal for Earnest Hall's or Richard Grant's promotion opportunities either. Indeed, Mr. Grizzard asserted in his deposition that after Richard Grant turned down the promotion to which the district court refers, Grant informed Grizzard that he, Grant, was again interested in being promoted.

positions were held by craftsmen and craftswomen. Dr. Haworth testified that blacks held only 33.4% of the precision craft jobs in Bolivar County. On the contrary, 70.1% of the general factory jobs belonged to blacks. To therefore compare the leader and foreman positions to precision craft, as opposed to the general factory pool from which the promotions in question came is like comparing apples to watermelons. The comparison is simply irrelevant.[29]

3. Conclusion

A proper analysis of this issue reveals that D & L improperly considered race in its promotion practices. D & L did not provide a race neutral reason why, when 70% of the promotion pool is made up of presumptively qualified blacks, only 22.7% of the leader/foreman promotions went to blacks during Mr. Grizzard's tenure—a number which had dropped from 64.8%. It appears that the company tried to make the promotion disparity disappear. Because there is no legitimate explanation for the decrease in minority promotions, Plaintiffs must prevail. This Court should reverse and remand for a trial on the damage issue here.

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[29]The district court's finding that blacks were treated favorably during the pre-Grizzard years is likewise unfounded. The promotions in the pre-Grizzard years roughly reflects the pool of presumptively eligible employees.

C. Temporary Upgrades to Rack/General Maintenance[30]

1. Qualified Employees

The majority's review of the temporary upgrade evidence is also questionable. The majority's contention that welding experience was needed for both general maintenance and rack maintenance positions is completely refuted by Wallace Bailey, the assistant supervisor over the maintenance department. Bailey testified at trial that one who sought a temporary upgrade needed to have a mechanical background, have a familiarity with electrical equipment, have the ability to understand written and verbal instructions, and *for rack*, as opposed to *general*, maintenance positions, possess welding experience. Bailey averred that one would not be disqualified if he did not possess all of these qualities. In fact, he asserted that he would not even exclude a person simply because that person could not weld. Nevertheless, the majority contends that no blacks were qualified for the general maintenance or rack maintenance positions. The evidence is to the contrary.

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[30]Both the district court and majority included all craft positions in their analysis, as opposed to the general and rack maintenance positions which are at issue here. They also analyzed promotions for all craft positions, instead of the maintenance positions in question. When James Grizzard came to the Cleveland plant, 66.7% of these maintenance positions were held by blacks. That number decreased during his tenure to 54.1% black. Also, there were only three promotions in the maintenance positions during the Grizzard years. The proper comparison is therefore the 33.3% promotions which went to blacks as compared with the 54.1% of the blacks who were presumptively eligible for promotion. Although the majority's analysis is flawed, this writer agrees that Plaintiffs did not prove whether the promotion disparity in the maintenance positions was statistically significant or that race discrimination played a part in the promotion decisions for rack and general maintenance.

Tommy Hardy: Contrary to the majority's recitation of the facts, Tommy Hardy did not have "limited" welding experience. To the contrary, Hardy testified that he ran a body shop in which he welded auto parts. He started the body shop in 1975 or 1976, and it was still in operation at the time of trial. Hardy's welding experience was therefore very extensive. Hardy averred that the type of welding done at D & L was the same type of welding which he performed in his body shop. His work in his body shop also revealed that he had mechanical ability. Hardy testified that he informed Lamar Hays and Terry Lamb, supervisors in the maintenance shop, of his interest in temporary upgrades numerous times.

Daniel Anderson: Anderson testified that he had limited welding experience. However, he asserted that he had substantial mechanical ability. He had taken mechanics classes throughout his four years in high school and had weekly repaired his or other employees' machines when D & L's maintenance personnel were unavailable. Wallace Bailey testified that he would be interested in a production worker who could take apart machines, as Anderson could.

Alfred Kemp, Sr.: Wallace Bailey testified during trial that Alfred Kemp, Sr., had an excellent background in maintenance. In fact, prior to James Grizzard's arrival at the plant, Kemp received both rack and general maintenance upgrades. The district court found that Howard Watson blocked every temporary upgrade which Kemp could have received during the years in question. That finding is unsupported by the record. While Watson testified that he would prohibit Kemp from receiving temporary upgrades if Kemp were needed for his general factory work, Watson conceded that he did not know whether he had blocked any such upgrades during the years in question. Wallace Bailey asserted that he knew

of no reason why Kemp was not given a single upgrade from August 1982 to August 1985.

Arthur Perry: According to Wallace Bailey, Arthur Perry was qualified for general maintenance work. However, Bailey could not state a reason why Perry had not been given upgrades prior to the filing of this lawsuit.

2. Statistical Analysis

Absent some other explanation—which the company did not give—D & L's temporary upgrades reveal grave racial disparities. The majority correctly sets forth the temporary upgrade information in footnote 36. Were the temporary upgrade hours insubstantial, the percentages set forth by the majority in that footnote might not seem consequential. However, the number of hours involved in both the general and rack maintenance upgrades is considerable. During the Grizzard years, white employees were given 1199.4 hours of upgrades in general maintenance. Blacks received just ninety-seven.

In the rack maintenance area, Edward Otto Wolfe, a white employee, received 745 hours of upgrades during the Grizzard pre-suit period. No blacks were awarded such an upgrade during this period. The majority places some import—import which is unsupported by the record—on the fact that Mr. Wolfe was the only person who received rack maintenance upgrades during the Grizzard era. James Grizzard testified in deposition that the maintenance department should *not* have solely awarded the upgrades to Mr. Wolfe. Likewise, Wallace Bailey asserted that he did not know why Mr. Wolfe was awarded all of the rack maintenance upgrades. An unfounded reason would appear to be improper. *See supra* note 13.

3. Conclusion

Why whites received 1199.4 hours of general maintenance upgrades and 745 hours of rack maintenance upgrades when blacks received just ninety-seven hours of general maintenance and no hours of rack maintenance upgrades will likely never be known by this or any other court. In one of his depositions, Mr. Grizzard unequivocally refused to explicate why the company failed to provide everyone the opportunity to compete for temporary upgrades. He refused to provide an explanation even when instructed to give one by D & L's attorney.

The numbers—and the named Plaintiffs' protests—speak loudly enough for themselves in the temporary upgrade claim. Only silence comes from D & L. Therefore, this Court should reverse and remand for trial on damages.

D. Conclusion

For the reasons heretofore stated, this writer would reverse and remand.

I dissent.

United States Court of Appeals,

Fifth Circuit.

No. 92-7554.

Daniel ANDERSON, Jr., et al., Plaintiffs-Appellants,

v.

DOUGLAS & LOMASON CO., INC., et al.,

Defendants,

Douglas & Lomason Co., Defendant-Appellee.

June 23, 1994.

Appeal from the United States District Court for the Northern District of Mississippi.

Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The plaintiffs brought a class action lawsuit against the Douglas & Lomason Co. ("D & L" or "the Company") on July 5, 1985, alleging that D & L intentionally discriminated against blacks in its hiring, promotion, and termination practices. The district court, after a lengthy bench trial, entered judgment against the plaintiffs on their Title

VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 claims. We affirm the district court's decision.[1]

I

D & L operates a plant in Cleveland, Bolivar County, Mississippi, that manufactures automobile parts. The plant employs approximately 657 people, 70% of whom are black. Applicants seeking entry-level positions with D & L need only meet certain minimal requirements, such as being at least eighteen years of age, physically able to perform the work, and able to read and write. The plaintiffs challenge certain hiring, promotion, and termination practices followed by D & L at the Cleveland plant after James Grizzard became plant manager in October 1982. The period between October 1982 and April 1986, when Grizzard ceased being manager at the Cleveland plant, was referred to at trial as "the Grizzard years."

A

The plaintiffs first challenge the hiring practices adopted by Patty Haynes when she became personnel manager at the Cleveland plant in September 1981. Haynes's hiring practices, which D & L followed throughout the Grizzard years, substantially differed from those of her predecessor, Harold Keeton. Keeton allowed employees to take applications for other persons, allowed people to submit applications twenty-four hours a day,

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[1]The plaintiffs in this case earlier appealed the decision of the district court denying their application for preliminary injunctive relief that would have regulated the hiring practices of D & L. We affirmed the district court's decision to deny a preliminary injunction in *Anderson v. Douglas & Lomason Co.*, 835 F.2d 128 (5th Cir.1988).

took applications whether or not D & L was hiring, and kept all applications in his "active" file for one year. He generally interviewed two to three applicants for every available position. In making hiring decisions, Keeton looked at the applicant's experience and attempted to hire those applicants with the most relevant work experience. Haynes, on the other hand, would not let employees take applications home, required all people who wanted to apply for employment to come to D & L's plant, accepted applications only when D & L was hiring, and kept applications for six months. She also accepted only one or two applications for every available position. Haynes testified that in making hiring decisions, she looked at the applicant's relevant work experience and would hire "the best person for the job."

During periods when D & L was hiring, Haynes permitted individuals who called the Company seeking information about possible employment to make appointments at which they could fill out an application. Haynes also accepted applications from individuals who came to the plant without appointments.[2] If a person called or came to the plant while D & L was hiring but after the applicant pool reached what Haynes considered to be the optimal size, plant guards told the individual either that D & L was not hiring or was not taking applications.[3]

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[2]Because of the large number of employees involved in deciding when D & L needed to hire employees, news that D & L was hiring quickly spread throughout the Company's general work force. For example, on one occasion individuals came to the plant to fill out applications even before Grizzard told Haynes that D & L would be hiring additional employees.

[3]A security fence, gate, and guardhouse prevented unauthorized persons from entering the plant. Haynes instructed the guards to

(continued...)

During periods that D & L was not hiring, Haynes or the guards informed individuals inquiring about employment either that the Company was not taking applications or was not hiring. Thus, it was possible for individuals to be told that D & L was not taking applications both when the Company was and was not hiring.

D & L also hired employees in what can best be called "spurts." Grizzard, after meeting with his department heads and supervisors, would determine whether D & L needed to hire additional workers. If D & L did need additional workers, Grizzard would so inform Haynes, who would begin taking applications. Haynes then would hire the number of employees sought by Grizzard. D & L rarely hired employees on a one-at-a-time or continuous basis and sometimes went months without hiring anyone.

D & L modified its application and hiring procedures in May 1985 by using the Mississippi State Employment Service ("MSES") to provide a pool of applicants from which it could hire. When D & L needed to hire employees, it would notify the MSES. The MSES then would refer both regular and on-the-job-training ("OJT") applicants to D & L.[4] Haynes would interview the referred applicants and select new employees using separate job orders for the regular and OJT applicants hired. All hiring from the MSES referrals occurred on three separate spurts from May to September 1985. D &

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[3](...continued)
allow people to enter the plant to fill out applications only when D & L was hiring and also gave the guards the names of those individuals with appointments to fill out applications.

[4]D & L received financial benefits from the state's on-the-job training program for every OJT applicant hired.

L has not hired any production workers since that time.

B

The plaintiffs next contend that D & L engaged in a pattern or practice of discrimination by refusing to promote blacks to leader and foreman positions.[5] D & L had no written criteria or guidelines for promotions, and Grizzard did not post notices concerning available promotion opportunities. Instead, department supervisors selected leaders and foremen for their departments with little or no input from Grizzard. Although D & L did not have written criteria for promotions, the supervisors consistently applied the following subjective criteria when selecting leaders and foreman: attitude, work record, relevant work experience, leadership abilities, willingness to help other employees, commitment to D & L, and seniority. Thus, D & L's promotion criteria are predominately of a subjective nature.

C

The plaintiffs also allege that D & L engaged in discriminatory practices by failing to provide blacks with temporary upgrades and permanent promotions to maintenance department positions. D & L employed a job-bidding process, as required by its collective bargaining agreement with the union representing D & L's

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[5]D & L promotes production employees to leaders so that it can evaluate their performance and potential to become foremen. D & L either selects foremen from among the leaders or hires them from outside the company. Both leaders and foremen are paid hourly. D & L also employs salaried supervisors, whom it selects from among the foremen or hires from outside the company. The plaintiffs do not contend that D & L discriminated in promoting blacks to the salaried supervisor positions.

employees, whereby employees had to submit bids for available "craft" positions. D & L, however, sometimes gave production employees temporary upgrades to craft jobs on a short-term basis.[6] D & L did not allow employees to bid on temporary upgrade positions, and the supervisors of the departments into which an employee would be temporarily upgraded determined whom to upgrade. The chosen employee's supervisor, however, could block the upgrade if the employee was needed for production work.

D & L considered employees in the general maintenance and rack maintenance departments to hold craft positions. As such, D & L required employees seeking those jobs to participate in the bidding process and maintenance department supervisors selected production employees for temporary upgrades to maintenance positions. The primary duties of general maintenance employees included pipe welding and repairing broken machinery. Welding, however, was the primary function of rack maintenance employees. Consequently, D & L considered welding experience to be more important than seniority for the purposes of temporary upgrades and permanent promotions to maintenance department jobs.

D

The plaintiffs finally contend that D & L discharged employees, using the Company's garnishment policy as a pretext, in retaliation for the employees filing charges with the Equal Employment Opportunity Commission ("EEOC"). D & L's shop rules provided that the

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[6]D & L would give an employee a temporary upgrade to a craft position when a regular craft employee was ill or on vacation, or simply when D & L needed an additional craft employee because of an increased work load.

Company would discharge any employee who received four or more garnishments from different creditors within a two-year period. Under this rule, only those garnishments not satisfied, withdrawn, or stayed within thirty days after D & L informed the employee of their existence counted against the four-garnishment limit. The two-year period began to run on the date D & L discussed the first garnishment with the employee and expired on the date that the thirty-day grace period for the fourth garnishment expired. Haynes, who was responsible for administering the garnishment policy, forgave all garnishments that D & L received before she became personnel manager.

II

A

The plaintiffs contend that the district court erred by analyzing the hiring and promotion class claims under the disparate treatment model instead of under the disparate impact model.[7] We examine discrimination claims using the disparate impact model when employment practices are "facially neutral in their treatment of different groups but ... in fact fall more harshly on one group than another and cannot be justified by business necessity." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). Although class action plaintiffs may

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[7]Even though plaintiffs alleged violations of both § 1981 and Title VII, the elements of both claims are identical. *Flanagan v. Aaron E. Henry Community Health Servs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir.1989); *Payne v. Travenol Lab., Inc.*, 673 F.2d 798, 818 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). Therefore, we employ only one analysis in evaluating the plaintiffs' Title VII and § 1981 claims.

challenge subjective or discretionary employment practices under the disparate impact model, *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 990, 108 S.Ct. 2777, 2786-87, 101 L.Ed.2d 827 (1988), the use of subjective or discretionary decision-making does not itself create an inference of discriminatory conduct. *Id.* at 999, 108 S.Ct. at 2791 (plurality opinion). Instead,

> "the plaintiff's burden in establishing a prima facie case [of discrimination] goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged.... Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Wards Cove Packaging Co. v. Atonio, 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989) (quoting *Watson,* 487 U.S. at 994, 108 S.Ct. at 2788-89). Thus, "[t]he disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the work force." *Pouncy v. Prudential Ins. Co.,* 668 F.2d 795, 800 (5th Cir.1982); *see also Wards Cove,* 490 U.S. at 657-58, 109 S.Ct. at 2125 (noting that a plaintiff alleging a discriminatory impact claim must "specifically show[ ] that each challenged practice has a significantly disparate impact on employment opportunities for whites and

nonwhites").[8]

The district court refused to analyze the plaintiffs' hiring and promotion claims using the disparate impact model because they did not identify a specific aspect of subjective decision-making by D & L that was shown to have any causal connection to the alleged class-based imbalance in D & L's general or supervisory work force. The plaintiffs pointed only to D & L's policy requiring individuals to fill out applications at the plant as a specific employment practice causing a class-based imbalance in the work force. This, however, does not justify analyzing the case under the disparate impact model because the plaintiffs did not demonstrate that the disparity they complain of was the result of the challenged policy. *See Wards Cove,* 490 U.S. at 657-58, 109 S.Ct. at 2125. Moreover, the plaintiffs identified no specific policy that allegedly caused a race-based imbalance in the number of persons who received promotions. Instead, the plaintiffs merely launched a wide-ranging attack on the cumulative effects of D & L's employment practices. The disparate impact model is not the appropriate vehicle from which to launch such an attack. *Pouncy,* 668 F.2d at 800. Consequently, the district court did not err in refusing to analyze the plaintiffs' claims using the disparate impact

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[8]After the plaintiff has established a prima facie case of discrimination, "the employer carries the burden of producing evidence of a business justification for his employment practice." *Wards Cove,* 490 U.S. at 659, 109 S.Ct. at 2126. However, "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times.*" *Watson,* 487 U.S. at 987, 108 S.Ct. at 2790, *quoted in Wards Cove,* 490 U.S. at 549, 109 S.Ct. at 2126.

model.[9] We thus review the plaintiffs' claims under the disparate treatment model.

B

In a disparate treatment class action, the plaintiffs "must prove discriminatory intent and demonstrate more than 'the mere occurrence of isolated or accidental or sporadic discriminatory acts.'" *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 190 (5th Cir.1983) (quoting *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855). The plaintiffs must establish "by a preponderance of the evidence that racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice." *Id.*

The plaintiffs may establish a prima facie case of disparate treatment "by the use of statistics if a 'gross' disparity in the treatment of workers based on race is shown." *Id.* However, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340, 97 S.Ct. at 1856-57. If

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[9]The district court also held that even if the plaintiffs did present a prima facie case under the disparate impact theory, they would not be able to satisfy their burden of persuasion because D & L "adequately justified the method and manner by which it conducted its hiring and put forth legitimate reasons totally unrelated to race for making the various changes in its practice. As such, ... plaintiffs have failed to show that the proffered hiring practices and changes therein did not serve the legitimate ends of the employer." *Id.* Because we hold that the plaintiffs did not present a prima facie case, we do not review whether they demonstrated by a preponderance of the evidence that they were discriminated against as a result of a specific employment practice.

statistical evidence is insufficient to establish discriminatory intent, the plaintiffs may bolster their case by introducing historical, individual, or circumstantial evidence. *Bernard v. Gulf Oil Corp.,* 841 F.2d 547, 568 (5th Cir.1988). The employer then may rebut the plaintiffs' prima facie case "by introducing proof that plaintiffs' statistics are 'inaccurate or insignificant' or by providing a 'non-discriminatory explanation for the apparently discriminatory result.'" *Id.* (citations omitted).

"[T]he ultimate determination of the existence of intentional discrimination is a question of fact, reviewed on appeal under the clearly erroneous standard." *Id.* In determining whether a finding is clearly erroneous, we must give "due regard to the trial court to judge the credibility of the witnesses." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

III

The plaintiffs argue that the district court erred in finding that D & L did not discriminate against blacks by restricting access to application forms. They argue that D & L unlawfully restricted access when Haynes refused to give employment applications to a number of blacks while D & L was seeking to hire new employees.

In attempting to prove a prima facie case, the plaintiffs primarily relied on anecdotal evidence provided by class members. A number of individuals testified that they were unable to obtain applications from D & L. The

district court found this anecdotal evidence unpersuasive because it was consistent with D & L's general application policies. This finding is not clearly erroneous. *See* part VIII.A *infra*. Additionally, the black individuals turned away at the gate by D & L guards never saw D & L give any applications to whites seeking employment, and no D & L employee ever directed derogatory or racially-oriented epitaphs at them.[10] Moreover, around the same time that D & L did not give these black individuals applications, D & L provided applications to many other blacks. Finally, the record contains no evidence indicating that D & L's application procedures affected potential black applicants any differently than potential white applicants.[11] Thus, the district court's finding that D & L did not discriminate against blacks who were seeking applications is not clearly erroneous. *See Falcon v. General Tel.*

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[10]One individual, Poitier Anderson, alleged that a guard told him that the Company was not giving applications to blacks. The district court did not find Anderson's testimony credible because Anderson filed two EEOC claims and filled out an EEOC questionnaire after the alleged statement was made without ever mentioning it. This finding is not clearly erroneous.

[11]The plaintiffs also argue that D & L discriminated against blacks by relying on word-of-mouth to inform interested persons of job openings and that this practice resulted in blacks having less access than whites to hiring information. D & L officials, however, testified that it was common knowledge among all employees, including those in non-managerial positions, that the Company was going to be hiring. In fact, non-employees on occasion knew D & L was about to hire before Grizzard informed Haynes. For example, plaintiff Chris Harris, along with two other blacks, heard from a black, non-supervisory employee that D & L was hiring. However, when Harris, who was waiting at the plant when Haynes arrived for work one morning, asked Haynes for an application, Haynes told her that D & L was not hiring. Later that morning, however, Grizzard informed Haynes that D & L would be hiring new employees, and Harris then obtained an application.

Co., 815 F.2d 317, 322 (5th Cir.1987) (finding that an employer's application procedures were not discriminatory where no evidence was introduced to prove that the procedures affected non-whites any differently than whites).

IV

The plaintiffs contend that statistical and anecdotal evidence established that D & L discriminated against blacks when hiring production workers during the Grizzard years. In comparing the number of blacks hired to the number of blacks who applied for production jobs, however, the district court found no evidence of discriminatory intent.

The job of production worker—an unskilled, entry-level position—required only that applicants be at least 18 years old, be able to read and write, and be able to bend, lift, and stoop. During the Grizzard years, D & L hired 482 production workers—46.5% of those hired were black. Black employees constituted more than 70% of D & L's general work force, and more than 80% of the production work force, during the Grizzard years. In Bolivar County, where D & L's plant is located, 1980 census data indicates that the overall labor force was 51.8% black, with blacks constituting 70.1% of all operators, laborers, and fabricators.

A

1

The plaintiffs first argue that the district court erred in crediting D & L's statistical analysis of its hiring practices during the Grizzard years. The plaintiffs contend that because D & L's statistical analysis was

fatally flawed, the district court should have relied on seven sets of statistical data presented by their expert.[12] D & L, not surprisingly, finds fault with each of plaintiffs' seven standards and contends that the district court correctly relied upon the standard proposed by D & L's expert.

Where plaintiffs use statistical evidence to challenge an employer's hiring practices, that evidence, to be probative of discriminatory intent, must compare the relevant portion of the employer's work force with the qualified population in the relevant labor market. *EEOC v. Olson's Dairy Queens, Inc.*, 989 F.2d 165, 168 (5th Cir.1993). The dispute between the plaintiffs and D & L revolves around how to properly define the "relevant labor market." D & L contends that the labor market should be defined using an "applicant flow" analysis—i.e., arguing that D & L's available labor force is best determined by examining the applications of those persons who actually sought employment with the Company. The plaintiffs, on the other hand, contend that an applicant flow analysis should not be used here because some of the applications submitted during the Grizzard years were not available for examination.[13] Thus, the plaintiffs argue

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[12]The EEOC filed an amicus curiae brief agreeing with the plaintiffs' contention that the district court erred in its statistical analysis of the evidence. We note, however, that the EEOC office in Mississippi rejected as meritless the discrimination charges filed by the plaintiffs.

[13]The plaintiffs also seem to suggest that we should draw adverse inferences against D & L because of the Company's failure to preserve employment applications for a one year period, pursuant to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(A)-(B) (1978). However, the "Uniform Guidelines are not legally binding. They have not been promulgated as regula-

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that any one of their seven different methods of measuring the relevant labor market was superior to D & L's applicant flow analysis.[14]

Actual applicant flow figures are the preferred method by which to measure an employer's hiring practices and performance. *Olson's Dairy Queens,* 989 F.2d at 168; *Phillips v. Joint Legislative Comm.,* 637 F.2d 1014, 1025 (5th Cir.1981), *cert. denied,* 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982); *Hester v. Southern Ry. Co.,* 497 F.2d 1374, 1379 (5th Cir.1974); *see also Mister v. Illinois Cent. Gulf R.R. Co.,* 832 F.2d 1427, 1435 (7th Cir.1987) ("Statistical analysis of the actual applicants has the advantage of self-selection: the study examines how the employer actually treated people who wanted the job. Applicant studies are preferable as a rule because Title VII governs the treatment of applicants."). "Other

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[13](...continued)
tions and do not have the force of law." *Clady v. County of Los Angeles,* 770 F.2d 1421 (9th Cir.1985) (citing *General Elec. Co. v. Gilbert,* 429 U.S. 125, 141-42, 97 S.Ct. 401, 410-11, 50 L.Ed.2d 343 (1976)), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986). Moreover, the applications kept by D & L roughly correspond to the six month period preceding the plaintiffs' filing of their EEOC charges. Although D & L normally would have discarded the April applications after six months, Haynes testified that she kept all applications after being notified of the EEOC charges. Consequently, the number of applications available for analysis was consistent with D & L's policy of keeping applications for only six months. We therefore decline to follow the plaintiffs' suggestion.

[14]Because we agree with the district court that actual applicant flow was the best measure of D & L's performance, we need not address whether the district court erred in failing to follow the seven standards offered by the plaintiffs to define the labor pool available to D & L. The district court rejected each standard as being flawed.

statistical measures are necessarily imperfect in differing ways and varying degrees. The best the court can do is to accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little." *Phillips*, 637 F.2d at 1025. Thus, when applicant flow figures are flawed or otherwise unavailable, we have allowed plaintiffs to use other statistical measures to establish a prima facie case of discrimination. *See, e.g., id.* (noting that actual applicant flow figures were unavailable because the employer did not identify applicants by race); *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 657-58 (5th Cir.1976) (upholding the district court's refusal to employ an applicant flow analysis), *modified in part on other grounds*, 544 F.2d 1258 (5th Cir.1977).

D & L's statistical expert, Dr. Joan Haworth, testified that, according to an applicant flow analysis, D & L did not discriminate in hiring black applicants. Haworth found that from April 1984 to January 1985, blacks constituted 46.7% of all applicants. She then compared this figure to the percentage of applicants hired by D & L during the Grizzard years who were black—45.5%—and determined that the difference was not statistically significant.[15] Thus, Dr. Haworth concluded, D & L did

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[15]Dr. Haworth divided the applications into six "pools," which reflected each hiring event, and compared the percentage of blacks and whites hired from the applicants in each pool. Only one hiring pool—pool 5, which covered the one-month period of October 1984—reflected a statistically significant standard deviation. Haworth also analyzed the pools on an aggregate basis, comparing the percentage of blacks hired who applied from April 1984 through mid-January 1985. She found what the parties agree to be a statistically significant standard deviation. Haworth testified, however, that pool 5 largely accounted for the deviation. When she excluded pool 5 from the analysis, she found the standard of deviation to be

(continued...)

not engage in discriminatory hiring practices.

The plaintiffs challenge Dr. Haworth's analysis on several grounds. They first assert that D & L did not keep all applications from the April to October 16 period, thus skewing the analysis so that the number of black applicants from that period was understated. As evidence of D & L's selective retention of applications, the plaintiffs point to the large difference between the number of applications submitted by blacks during the April to October period and the October 17 to January period.[16] The district court found, however, that one explanation for the large increase in applications submitted by blacks during the latter period was that Oliver Robinson, a black D & L employee, had begun a campaign to encourage blacks in Bolivar County to apply for employment at D & L and file discrimination charges against D & L with the EEOC.[17] This finding is not clearly erroneous.

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[15](...continued)
statistically insignificant. The district court credited Haworth's testimony that the aberrational result found in pool 5 was due to the fact that the percentage of white applicants with relevant employment experience was higher in pool 5 than in other pools. As a result, the district court found that pool 5 should be excluded from the analysis as an anomaly. This finding is not clearly erroneous. *See Lewis v. NLRB*, 750 F.2d 1266, 1276 n. 17 (5th Cir.1985) (noting that one significant standard deviation did not establish disparate treatment).

[16]Applications submitted by blacks constituted 37.6% of the April to October applications and 60.4% of the October to January applications.

[17]In reviewing the record, we note that many of the witnesses had little or no familiarity with the charges that they signed and filed with the EEOC. Indeed, one person—Richard Grant—stated that he did
(continued...)

As additional evidence that D & L failed to retain applications, the plaintiffs contend that the number of applications retained by D & L indicates that Haynes accepted approximately eight and one-half applications for every seven positions filled during the pre-suit period, but accepted about ten applications for every seven positions filled during the post-suit period. The plaintiffs contend that the difference demonstrates that D & L did not retain all applications from the April to October period. Haynes, however, testified that she believed she kept all the applications from the April to October period, although she ultimately was unsure whether she had discarded some applications. Moreover, Haworth testified that while she believed she had all the relevant applications, she nevertheless had a "reasonably large amount" of the applications for the purposes of her analysis. The district court resolved this dispute by finding that D & L did retain all applications pertaining to the relevant period, and we cannot say that this resolution was clear error. *See Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 901 (5th Cir.1987) (finding that the district court did not err in accepting an employer's statistical analysis because, while it was flawed, the plaintiffs' analysis suffered from more serious deficiencies); *Nash v. City of Houston Civic Ctr.*, 800 F.2d 491, 497 (5th Cir.1986) (noting that where there are competing yet permissible views of the evidence, we must affirm the district court's finding).

The plaintiffs next argue that even if the applicant flow analysis was the best standard by which to measure the labor pool available to D & L, the district court erred in accepting Dr. Haworth's analysis because it was based on samples too small to allow for a meaningful statistical

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[17](...continued)
not read the charge but merely signed it when it was presented to him. *See* note 46 *infra*.

analysis. When statistics are based on small sample sizes, the plaintiffs contend, the presence or absence of statistical significance is not a reliable indicator of discrimination. Whether or not a sample is too small to yield statistically meaningful results, however, must be determined on a case-by-case basis. *Watson,* 487 U.S. at 995 n. 3, 108 S.Ct. at 2789 n. 3; *Rendon v. AT & T Technologies,* 883 F.2d 388, 397 (5th Cir.1989). The district court found Dr. Haworth's analysis to be more credible and more persuasive than the seven analyses offered by the plaintiffs' expert. "We do not have the statistical expertise to declare a particular statistical technique inappropriate where a qualified expert expresses a contrary view and the district court credits the testimony." *Id.; see also Trevino,* 811 F.2d at 904 (holding that the district court did not err in crediting the defendant's statistical evidence over contrary evidence); *Nash,* 800 F.2d at 497 (noting that we must affirm the district court's finding where there are two permissible views of the evidence). Thus, we find that the district court did not err in crediting D & L's statistical analysis, which demonstrated that D & L did not engage in discriminatory hiring practices, over the analyses offered by the plaintiffs.[18]

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The plaintiffs further argue that the district court

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[18]Assuming *arguendo* that the pools were too small to permit meaningful statistical analysis, Dr. Haworth also analyzed the pools on an aggregate basis and found no statistically significant deviation when pool 5 was omitted. *See* note 15 *supra.* Thus, this analysis, which the district court also credited, was not based on a sample significantly smaller than that utilized by the plaintiffs' expert. Therefore, the district court did not clearly err in refusing to find that D & L possessed discriminatory intent with regard to its hiring practices.

erred in accepting Haworth's analysis of D & L's hiring practices during the period in which the Company exclusively relied upon MSES to provide acceptable applicants. In relying on Dr. Haworth's analysis, the district court found that her job-order-by-job-order analysis was more persuasive because it more closely reflected the actual process through which D & L hired employees. The plaintiffs' analyses, *tout au contraire,* grouped the six different job orders into one set of statistics.[19]

D & L placed job orders with MSES three times during the Grizzard years. On each occasion, D & L sought two types of referral—one order requested regular referrals and one order requested OJT referrals. Dr. Haworth compared the percentages of blacks and whites hired by D & L for each separate job order and found that in only one job order did the difference between the actual and expected number of blacks hired exceed two standard deviations.[20] The district court found, in light of the record as a whole, that this single statistical disparity did not establish a prima facie case of discriminatory intent. We find that the district court's conclusions regarding the statistical analyses of D & L's hiring practices are not clearly erroneous. *See Lewis v. NLRB,* 750 F.2d 1266, 1276 n. 17 (5th Cir.1985) (noting that a single statistically significant disparity "by no means

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[19]The plaintiffs' analysis showed that D & L hired 84.4% of white applicants and 50.8% of black applicants referred by the MSES.

[20]The plaintiffs again contend that the district court should not have accepted Haworth's analysis because it was based on sample sizes too small to yield meaningful statistical data. Whether a sample is too small to yield meaningful results is a determination made by the district court on a case-by-case basis. *Watson,* 487 U.S. at 995 n. 13, 108 S.Ct. at 2789 n. 13; *Rendon,* 883 F.2d at 397. Under the facts of this case, the district court did not clearly err in accepting D & L's analysis.

commands an inference of discrimination").

B

The plaintiffs attempted to buttress their statistical evidence with anecdotal evidence regarding class members whom D & L allegedly did not hire because of their race. While Title VII plaintiffs may use evidence regarding individual instances of discrimination to bolster their class claim, *Bernard,* 841 F.2d at 568, the district court found that D & L did not discriminate in refusing to hire the individuals at issue. This finding is not clearly erroneous. *See* part VIII.B *infra.* Accordingly, the plaintiffs' anecdotal evidence, combined with their statistical evidence, did not establish a prima facie case of disparate treatment.

V

The plaintiffs introduced statistical, historical, and anecdotal evidence in an attempt to prove that D & L unlawfully discriminated against blacks when promoting employees to leader and foreman positions. The plaintiffs' statistical evidence regarding the promotion claim compared the number of blacks promoted to leader and foreman positions during the pre-suit Grizzard years with the percentage of blacks present in D & L's work force; the plaintiffs also sought to compare the percentage of promotions received by blacks during the pre-suit Grizzard years with the respective percentages for the pre-Grizzard and post-suit periods. D & L, on the other hand, introduced statistics comparing the number of blacks holding leader and foreman positions to the number of blacks holding supervisory positions in Bolivar County. The district court ultimately determined that D & L's statistical analysis was the better one and therefore credited it. Moreover, the district found that the historical, anecdotal, and other circumstantial evidence submit-

ted by the plaintiffs did not establish that D & L engaged in a pattern or practice of discrimination. The plaintiffs, of course, challenge these determinations.

A

A court may infer that an employer engaged in racial discrimination when promoting workers if statistics, when comparing the number of non-whites and whites promoted, demonstrate a gross statistical disparity. *Lewis,* 750 F.2d at 1271. Statistical evidence, however, must be meaningful in light of all the surrounding facts and circumstances. *Pouncy,* 668 F.2d at 1275. "In establishing an inference of discrimination from statistical evidence, the 'required comparison [is] to a *qualified* pool of employees *presumptively eligible* for promotion.'" *Lewis,* 750 F.2d at 1275 (quoting *Pouncy,* 668 F.2d at 803).

1

The plaintiffs introduced statistical evidence comparing the percentage of leader and foreman promotions given to blacks during the Grizzard years—23%—to the percentage of black employees in D & L's production work force—80%. According to the plaintiffs, these statistics indicated a pattern of discrimination in the promotion of D & L employees to leader and foreman positions. The plaintiffs contend that this comparison is appropriate because D & L selected leaders and foremen from within the organization. The district court rejected the plaintiffs' approach as being overbroad because not everyone in D & L's production work force was qualified for promotion. The district court further found that because D & L had hired individuals from outside D & L's work force to be foremen and supervisors, the plaintiffs' approach was too narrow because it excluded individuals outside D & L's production work force who

were qualified to be leaders and foremen.[21] We agree that the plaintiffs made the forbidden assumption that all D & L employees were equally qualified for promotion. *See Lewis*, 750 F.2d at 1275 (rejecting the plaintiffs' analysis because they brought into their comparison "employees who are not to be considered for promotion"); *Pouncy*, 668 F.2d at 803 (refusing to infer that an employer discriminated against black employees in awarding promotions simply because the plaintiffs demonstrated that the percentage of black employees promoted was "far

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[21]The district court also found that even if it was proper to use the number of blacks in D & L's production work force as a benchmark, the evidence did not establish a prima facie case of discriminatory conduct:

> [W]hen comparing the percentage of blacks in the leader, foreman, and supervisor classifications at the company to the percentage of blacks in the production workforce, the ratio of the percentage [of] black[s] in supervisory categories (42%) to the percentage of blacks in production workforce (80%) is much higher than the similar proportion of the Bolivar County figure of 19 percent black in supervisors of production workers, when compared with the blue-collar (60.7%) and manufacturing (58.2%) rates. Stated otherwise, if blacks at [D & L] were represented in supervision in the same percentage as in other industries in Bolivar County relative to the percentage in the production workforce, the benchmark would only be 25%, or seventeen percentage points less than what it has been. Thus, even from the perspective of plaintiffs, the defendant's performance relative to its production workforce far exceeds the performance of other Bolivar County companies.

Record Excerpts at 91. As we uphold the district court's determination on other grounds, we need not reach this issue.

less" than the percentage in black employees in the employer's work force). Consequently, the district court did not err in finding the plaintiffs' statistical evidence for leader and foreman promotions unpersuasive.

2

The plaintiffs also introduced statistical evidence showing that blacks constituted 64% of persons promoted to leader and foreman positions during the pre-Grizzard and post-suit periods, but only 23% of those promoted during the pre-suit Grizzard period. The plaintiffs also note, however, that during the pre-Grizzard period, blacks apparently received favorable treatment with regard to promotions: whites worked on average for 71.8 months before promotion while blacks worked on average only 43 months. *See also* note 29 *infra*. Because of the bias in favor of blacks during the pre-Grizzard period, the district court found it unhelpful to compare statistics from that period with statistics from the post-Grizzard periods. *Cf. Lewis,* 750 F.2d at 1275 n. 14 (noting that an employer's affirmative action program could skew statistical analyses in disparate treatment cases). Because D & L was not required to continue the preferential treatment given black employees during the pre-Grizzard period, *see United Steelworkers v. Weber,* 443 U.S. 193, 205-06, 99 S.Ct. 2721, 2728, 61 L.Ed.2d 480 (1979), the district court thus did not err in disregarding the plaintiffs' statistical evidence regarding the pre-Grizzard period.

3

In finding no evidence of discriminatory conduct, the district court accepted D & L's statistical evidence, which compared the percentage of black supervisors at D

& L to the percentage of black supervisors county-wide.[22] We believe that the district court erred in comparing the total number of black supervisors at D & L to the number of black supervisors county-wide. An employer cannot escape liability under Title VII by demonstrating that, at the bottom line, minorities are represented in supervisory capacities at non-discriminatory levels. *See Wards Cove,* 490 U.S. at 655-57, 109 S.Ct. at 2124; *Connecticut v. Teal,* 457 U.S. 440, 450, 102 S.Ct. 2525, 2532, 73 L.Ed.2d 130 (1982). Thus, the relevant comparison is between the number of blacks promoted during the pre-suit Grizzard years and the number of blacks that statistically should have been promoted in the absence of any discrimination.[23]

The plaintiffs have demonstrated that blacks received 23% of all promotions during the pre-suit Grizzard years. At the same time, blacks constituted 19.1% of the supervisors in production-related occupa-

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[22]D & L demonstrated that blacks constituted 42% its leaders, foremen, and supervisors during the Grizzard years. Based on this evidence, the district court found that the percentage of black employees in supervisor positions at D & L "was not only well within but beyond the range of what would be expected when compared with the relevant labor market, which, in this case, is the percentage of blacks in supervision in production occupations."

[23]However, a demonstration by the employer that, at the "bottom-line," blacks were overrepresented in its work force still is relevant to the ultimate determination whether the employer engaged in a pattern or practice of discrimination. *See St. Mary's Honor Center v. Hicks,* --- U.S. ----, ----, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993).

tions in Bolivar County.[24] The district court, because blacks were represented in D & L's work force in a ratio higher than statistically predicted,[25] inflated the 19.1% figure to 25%—i.e., blacks statistically should have received 25% of all promotions to leader and foreman positions. Because the number of blacks who received promotions is not statistically different from the number of blacks expected to receive promotions,[26] the district

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[24]The plaintiffs challenge the district court's use of this figure, arguing that it encompassed only supervisors of "precision" production occupations, such as metal working occupations, apprentices, boilermakers, and sheet metal workers. On direct examination, however, D & L's expert, Dr. Haworth, testified that leaders and foremen at D & L would be included in the 19.1%-black figure. The district court did not err in resolving this credibility dispute in favor of D & L. *Anderson*, 470 U.S. at 575, 105 S.Ct. at 1512. The district court reasonably concluded that the figure was sufficiently similar to the occupation of D & L supervisors, especially when the plaintiffs failed to introduce any evidence to the contrary.

[25]At all times during the relevant period, D & L's workforce was more than 70% black, and the production workforce was approximately 80% black. 1980 Census data showed that the civilian labor force in Bolivar County was 51.9% black, the manufacturing labor force was 58.2% black, and the blue-collar labor force was 60.7% black.

[26]Applying the mathematical formula suggested in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), the difference between the number of blacks expected to receive promotions and the number who actually did receive promotions is not statistically significant (total of 22 promotions):

$$\text{Number of S/D} = \frac{\text{O-NP}}{\text{NP (1-NP)}}$$

S/D = Standard Deviations

(continued...)

court did not err in failing to find an inference of disparate treatment with regard to D & L's promotion practices. *See Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362 n. 3 (5th Cir.1986) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below."), *cert. denied,* 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

B

The plaintiffs contend that because D & L based its promotion decisions on subjective criteria, D & L could have failed to promote blacks for discriminatory reasons. The district court rejected the plaintiffs' argument. A promotional system that is based upon subjective criteria is not "discriminatory per se." *Page v. U.S.*

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[26](...continued)

O = Actual number of blacks who received a promotion

N = Number of workers who received a promotion

P = Probability of a black being promoted from the relevant population

$$\text{Thus, } \frac{5 - (22 \times 25\%)}{2.03} = -0.25$$

See also Lopez v. Laborers Int'l Union Local No. 18, 987 F.2d 1210, 1215 n. 14 (5th Cir.1993); *Lewis,* 750 F.2d at 1274 n. 12. Because the difference is less than 2 standard deviations, it is not statistically significant. We also note that if we use 42%—the number of D & L leaders, foremen, and supervisors who were black—in place of 25%, the difference between the number of blacks promoted and the expected number (9.24) still is not statistically significant (1.84 standard deviations). Consequently, the plaintiffs failed to prove a prima facie case of discrimination.

Indus., Inc., 726 F.2d 1038, 1046 (5th Cir.1984); *see also Watson*, 487 U.S. at 990, 108 S.Ct. at 2786 ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."). However, "promotion systems utilizing subjective evaluations by all white supervisors" can be evidence of discrimination in disparate treatment cases. *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 827 (5th Cir.1982); *Lewis*, 750 F.2d at 1276.

This case is distinguishable from our prior holdings, however, because the D & L supervisors who evaluated and promoted employees were both black and white. As the district court found,

> [w]hile the subjectivity of the criteria of attitude and commitment could result in racial disparity in the potential for promotion, it is clear from the record evidence that the individuals recommended or considered for promotion included black individuals recommended by white foremen and supervisors, white individuals recommended by black foremen and supervisors, and individuals recommended by both.

Record Excerpts at 90; *cf. St. Mary's Honor Ctr. v. Hicks*, --- U.S. ----, ----, 113 S.Ct. 2742, 2751, 125 L.Ed.2d 407 (1993) (noting that evidence in a hiring case tending to negate a finding of discrimination includes the fact that the hiring officer is of the same minority group as the plaintiff). The district court's finding is supported by the

evidence.[27] Accordingly, the district court did not err in refusing to find that the subjective component of D & L's promotion policy constituted evidence of discriminatory intent.[28] *See Bernard,* 841 F.2d at 547 (holding that an employer's unwritten and subjective standards for promotion were not discriminatorily applied).

C

The plaintiffs introduced evidence of the comparative seniority of white and black employees prior to promotion to support their argument that D & L was discriminating against blacks by promoting less senior

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[27]Grizzard recommended to his supervisors that they consider Harold Brown, Richard Grant, Marilyn Holmes, and Vera Watson—all black employees—for promotion. Richard Williams, a black supervisor, testified that he offered one promotion to four black employees, who rejected it, before offering it to Robert LaPresto, a white employee. Charlie West, another black supervisor, recommended James Haney, a white employee, for promotion. L.C. Taylor, a black shift supervisor, recommended Chris Strickland, a white employee, for promotion while Howard Watson recommended Vera Watson, a black employee, for a leader position. E.W. Tolbert, a black supervisor, testified that he was involved in promoting Randy Daniels, a white employee who was offered a promotion only after six black employee had turned it down. *See also* part V.C *infra.*

[28]We also note that D & L substantially increased the number of blacks holding salaried supervisor positions, which the plaintiffs exclude from their claim that D & L discriminated against black employees with regard to promotions. Grizzard promoted E.W. Tolbert from a shift supervisor position to production manager, the second-in-command at the plant. Charlie West then took over Tolbert's position as a shift supervisor. Grizzard also promoted Richard Williams from supervisor to department head, Vera Watson to foreman and then to shift supervisor, and Harold Brown, Charlie Lofton, and Sylvester Parker from foremen to salaried supervisors.

whites.[29] The district court rejected this evidence because it ignored that more senior black employees turned down several promotions later given to less senior white employees.[30]

The average length of time between promotions

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[29]According to the plaintiffs, white employees between 1978 and September 1982 worked for D & L on average 71.8 months before promotion; black employees on average worked only 43.2 months before promotion. During the presuit Grizzard years, the plaintiffs contend that whites worked on average 15.1 months before promotion and blacks worked on average 84.8 months. We note, however, that using plaintiffs' exhibit 144, whites apparently worked on average 51 months before promotion. While we have not recomputed every number that the plaintiffs cite in their brief, we point out this discrepancy to demonstrate the problems that exist with the plaintiffs' statistical analysis.

[30]The district court also stated that the plaintiffs' evidence

> "paint[ed] a distorted picture which attaches responsibility to Mr. Grizzard for the years before his arrival that a black employee was not being promoted instead of giving him credit for promoting black employees his predecessors overlooked. From this perspective, the court finds that the only way Grizzard could have passed muster was to continue to bypass the senior black employees in favor of recently-hired black employees.... Moreover, plaintiffs have chosen figures which attempt to compare the pre- and post-Grizzard periods for promotions, conveniently ignoring the fact that in the pre-Grizzard period blacks were given more favorable treatment—the system was not neutral. Blacks were on average less senior than their white counterparts by some twenty-eight months."

Record Excerpts at 101-02.

may be relevant in proving discrimination by an employer. *See Pouncy*, 668 F.2d at 804. However, we agree with the district court that the statistics submitted by the plaintiffs are fatally flawed because they overlook the black employees who turned down promotions later offered to white employees. *See Trevino*, 811 F.2d at 902 (finding that the plaintiffs' statistics demonstrating a "significant disparity between Hispanics and non-Hispanics for the total elapsed time from the date of hire" to promotion was "not compellingly persuasive evidence" of discrimination). For example, Robert LaPresto, a white employee, was promoted to leader after being employed by D & L for approximately four months. However, the position was first offered to four black employees who rejected it. D & L promoted James Haney, another white employee, to leader nine months after hiring him, but only after two black employees first declined the offer of promotion. Six black employees rejected a promotion given to white employee Randy Daniels, whom D & L promoted to leader less than two months after his employment began.[31] We also note that during the post-suit period, during which blacks received 64% of the promotions to leader and foreman and about which the plaintiffs do not complain, blacks worked on average 154.9 months before promotion while whites worked only 51 months. This comparison demonstrates that statistics regarding the relative seniority of workers promoted by D & L cannot

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[31]The plaintiffs contend that D & L knew that the black employees would turn down the promotion offers. The district court, however, credited the testimony of E.W. Tolbert—D & L's production manager—that the black employees who turned down promotion offers were offered multiple promotions because they were above-average employees and their supervisors felt that they might accept a new offer, an offer of a different job, or an offer made by someone else. The district court was within its province to resolve credibility disputes, *Anderson*, 470 U.S. at 575, 105 S.Ct. at 1512, and the district court's finding on this issue is not clearly erroneous.

support a finding of disparate treatment. *Cf. Pouncy,* 668 F.2d at 803 (finding that a discrepancy between the mean salaries of black and white employees could be explained by "any number of nondiscriminatory factors," including different skill levels, previous training, and experience). Consequently, like the district court, we refuse to infer from this evidence that D & L's promotion practices unlawfully disfavored black employees.

D

The district court considered evidence put forward by the plaintiffs with regard to alleged individual instances of discrimination and concluded that D & L gave legitimate reasons why it did not promote most of the individuals at issue. The district court also found that D & L did not promote the other individuals simply because they were overlooked or did not come to the attention of management.[32] *See* part VIII.C *infra.* Thus, the anecdotal evidence did not, as the plaintiffs assert, support a finding that D & L engaged in a pattern or practice of discrimination. *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 259, 101 S.Ct. 1089, 1097, 67 L.Ed.2d 207 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the appli-

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[32]The plaintiffs contend that the district court's findings would allow D & L to discriminate against many black employees without hindrance as long as the Company treated other blacks the same as white employees. However, "this attack overstates the impact of the district court's ... analysis." *Lewis,* 750 F.2d at 1274 n. 11. D & L introduced evidence demonstrating that legitimate reasons lay behind the delayed promotions for some blacks and the relatively early promotions for some whites. This evidence, as the district court properly found, tended to negate the plaintiffs' attempted showing that a pattern or practice of discrimination in D & L's promotion policies existed. *Id.*

cants does not in itself expose him to Title VII liability...."); *Odom v. Frank*, 3 F.3d 839, 849-50 (5th Cir.1993) (noting that the perpetuation of a "good old boy" network does not amount to racial discrimination). Consequently, the district court did not clearly err in concluding that the plaintiffs' anecdotal evidence did not support their claim of disparate treatment. *See Lewis*, 750 F.2d at 1276-77 (finding that anecdotal evidence supported a finding only of isolated instances of discrimination).

E

The plaintiffs further contend that the district court erred in rejecting their attempt to buttress their statistical evidence of discrimination with evidence regarding D & L's history of discrimination. The plaintiffs argued that D & L's supervisors both used racially derogatory language in speaking to black employees and physically abused them, without any repercussions from upper management. After reviewing the anecdotal evidence presented by the plaintiffs, the district court concluded that D & L at no time encouraged or condoned any mistreatment of black employees by supervisors. Specifically, the district court found that

> [t]he sum total of the evidence with regard to these allegations of what constitutes a claim of hostile environment in the form of disparate treatment of black employees amounts, at best, to proof of isolated acts of the use of vulgar or racially derogatory language by no more than two or three company officials and a single instance of physical contact between a company official and a single black employee, all occurring over a period of three or more years. What is also abundantly clear is that when reported to the appropriate company officials, every complained of incident

> was immediately followed by affirmative company action in the form of apologies to the employees involved, counseling of the managers involved, and/or discipline of those management officials. Moreover, the plaintiffs' allegations relate to the time period after the arrival of the Plant Manager James Grizzard, with there being not a scintilla of evidence that Grizzard participated in or condoned any of the complained of acts, with the exception of possibly two instance of the use of vulgar language, both of which, under the undisputed circumstances, the court finds to have been justified, and one, about which the union filed a grievance, for which Mr. Grizzard apologized.[33]

Record Excerpts at 129-30. The district court further found that some of the individuals who alleged that D & L officials used racially derogatory language were not credible.

It is within the province of the district court to resolve credibility disputes. *Anderson*, 470 U.S. at 564, 105 S.Ct. at 1504. Moreover, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not indicative of a pattern or practice

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[33]Plaintiff Daniel Anderson testified that upon returning to work from a doctor's examination, his supervisor refused to let him take a break that he had missed. Anderson then clocked out and left the plant. Grizzard confronted Anderson the next day, asking him "who in the hell did he think he was to be able to just leave because he couldn't take his break." On the second occasion, Grizzard used the term "son-of-a-bitch" when he discovered that someone had removed a notice from the company bulletin board. When the union filed a grievance regarding the incident, Grizzard issued a written apology that explained his comments were not directed to any of the employees within earshot.

of racial discrimination in violation of Title VII. *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir.1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). After undertaking an independent review of the record, we conclude that the district court did not err in finding that the evidence demonstrated, at best, only isolated instances of racially motivated acts insufficient to establish class-wide disparate treatment.[34] *See Bernard,* 841 F.2d at 569 (holding that the anecdotal testimony of the plaintiffs' witnesses did not establish class-wide disparate treatment).

VI

The class plaintiffs finally argue that the district court erred in finding that D & L did not discriminate against blacks when giving temporary upgrade assignments to general maintenance and rack maintenance positions.[35] They contend that the statistical evidence demonstrated a gross disparity in the treatment of white and black employees, thus establishing a prima facie case of discrimination.[36] It does not appear that the plaintiffs

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[34]We also note that two black salaried supervisors—Charlie West and E.W. Tolbert—and a black foreman—Monroe O'Neal—testified that Grizzard was "a good man," "a super plant manager," and was not prejudiced. Moreover, Tolbert stated that Howard Watson was an "outstanding production manager" who also was not prejudiced.

[35]General and rack maintenance positions are two of the job classifications at D & L's plant considered to be "craft" positions.

[36]The plaintiffs claim that the following statistical evidence established a prima facie case of discrimination:

Table 6. Temporary Upgrades to General Maintenance: Percentage of Total Hours Assigned

(continued...)

presented any expert testimony explaining the meaning or statistical significance of this evidence. Consequently, our review of the evidence has been unduly hampered by the plaintiffs' failure to establish whether their statistics were meaningful or significant in light of the particular facts of this case. *See Teamsters,* 431 U.S. at 340, 97 S.Ct. at 1857 (noting that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances"). Neverthe-

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[36](...continued)

Time Period	% White	% Black
Pre-Grizzard Period [1/15/81-10/2/82]	11.60%	88.40%
Grizzard Pre-Suit Period [10/2/82-7/4/85]	92.59%	7.40%
Post-Suit Period [7/5/85-9/19/85]	46.60%	53.40%

Table 7. Temporary Upgrades to Rack Maintenance: Percentage of Total Hours Assigned

Time Period	% White	% Black
Pre-Grizzard Period	85.40%	14.61%
Grizzard Pre-Suit Period	100.00%	0.00%
Post-Suit Period	0.00%	100.00%

Brief for Plaintiffs at 66. In presenting these statistics, the plaintiffs stated only that the statistics were "drawn from [the] stipulated data." After much searching, we discovered that the raw data undergirding these statistics was presented to the district court through a joint stipulation.

less, after closely reviewing the plaintiffs' evidence, we conclude that the plaintiffs failed to establish a prima facie case of discrimination.

Eleven employees, three of whom were black, received temporary upgrades to general maintenance jobs during the Grizzard pre-suit period. During this period, two white employees—William Myers and James Partridge—received 68% of the total temporary-upgrade hours. By comparison, two black employees—James Triplett and Alfred Kemp, Sr.—received approximately 88% of all temporary-upgrade hours during the pre-Grizzard period; in the post-suit period, one white employee—Robert Haynes, Jr.—and one black employee—Arthur Perry—received approximately 94% of all temporary-upgrade hours. The plaintiffs introduced no evidence demonstrating that other individuals desired or were qualified for temporary-upgrade positions.[37] Consequently, we have nothing with which to compare the plaintiffs' statistics. As a result, the statistics are meaningless.[38]

Other evidence supports the district court's deter-

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[37]For example, the plaintiffs did introduce evidence pertaining to the qualifications of Thomas Hardy and Daniel Anderson, Jr. for temporary upgrade assignments. These two individuals, however, were not qualified for such assignments. *See* part VIII.D *infra.*

[38]The plaintiffs' statistics regarding the number of rack-maintenance temporary-upgrade hours worked by blacks suffer from the same problems. For example, out of the three employees given temporary upgrades in the pre-Grizzard period, a white employee—Willie Mullen—worked approximately 82% of the total hours. In the Grizzard pre-suit period, one white employee—Edward Otto—worked 100% of the hours. In the post-suit period, one black employee—Alfred Kemp, Sr.—received 95% of the temporary upgrade hours.

mination that D & L did not discriminate in giving employees temporary upgrade assignments. For example, the percentage of blacks in permanent craft positions during the Grizzard years ranged from 66.7% to 73.7%. During the immediately preceding years, blacks comprised 57.1% to 63% of the employees in craft positions.[39] Moreover, D & L during the Grizzard years awarded seven out of the eight permanent promotions to craft positions to black employees. Moreover, Alfred Kemp, one of the black employees who received no temporary upgrades during the Grizzard pre-suit period but did during both the pre-Grizzard and post-suit periods, testified unequivocally that D & L was a good place to work and always treated him fairly.[40] We also note the lack of evidence regarding the number of employees, black and white, who received temporary upgrades to craft positions in non-maintenance departments. *See Wards Cove,* 490 U.S. at 651-53, 109 S.Ct. at 2122 (noting that plaintiffs should not unnecessarily segment the employer's work force in an attempt to prove discrimination). We therefore agree with the district court's conclusion that D & L did not discriminate in selecting employees for temporary upgrade assignments in the rack maintenance and general maintenance departments.

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[39]The 1980 census figures for Bolivar County indicate that blacks held only 33.4% of all precision production craft and repair positions county-wide.

[40]Howard Watson, who had to approve Kemp's availability for temporary assignments, supplied a legitimate, nondiscriminatory reason for Kemp's lack of temporary upgrade assignments during the Grizzard pre-suit period. Watson testified that he sometimes refused to approve Kemp for temporary upgrades because Kemp was needed in a production department.

VII

The statistical evidence presented by the plaintiffs does not present the gross statistical disparity that, when considered in light of the entire record, would require a reversal of the district court's ultimate findings that no pattern of discrimination existed with regard to D & L's hiring and promotion practices. Nor is the historical and anecdotal evidence introduced by the plaintiffs sufficient to support a finding of disparate treatment. Accordingly, we **AFFIRM** the district court's judgment on the class claims.

VIII

The district judge rejected the individual claims of various plaintiffs challenging the treatment they received pursuant to D & L's hiring, promotion, and termination policies. "In a disparate treatment case involving an individual, the plaintiff initially has the burden of showing a prima facie case of discrimination." *Carroll*, 708 F.2d at 195. A plaintiff meets this initial burden by demonstrating

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applica[tions] from persons [who possessed the plaintiff's] qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the

employee." *Burdine,* 450 U.S. at 254, 101 S.Ct. at 1094. If the plaintiff establishes a prima facie case of discrimination, "the burden shifts to the employer to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Carroll,* 708 F.2d at 195. If the employer "carries this burden of production, the presumption raised by the prima facie case is rebutted" and drops from the case. *Burdine,* 450 U.S. at 255 & n. 10, 101 S.Ct. at 1095 & n. 10. "The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision,' and that race was." *St. Mary's,* --- U.S. at ---, 113 S.Ct. at 2747 (quoting *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095). The plaintiff at all times bears the burden of persuading the court that he or she was the victim of intentional discrimination.[41] *Id.* --- U.S. at ----, 113 S.Ct. at 2747-48.

A

A number of individual plaintiffs claim that D & L unlawfully discriminated against them on the basis of race by refusing to give them applications during the Grizzard years—October 1982 through April 1986. The district court found that some of the plaintiffs were not credible because, during the time they allegedly could not

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[41]"When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* ritual is unimportant. We focus our inquiry on whether the record contains evidence upon which a reasonable trier of fact could have concluded as the jury did." *Molnar v. Ebasco Constructors, Inc.,* 986 F.2d 115, 118 (5th Cir.1993) (citation omitted).

obtain applications, other blacks were given applications.[42] Furthermore, the district court found that D & L properly refused to give many of the plaintiffs applications because the Company either was not hiring when the plaintiffs were seeking applications or was hiring but had already received a sufficient number applications for the positions to be filled. The district court's findings are not clearly erroneous. An extensive review of the record has convinced us that it contains no evidence indicating that the plaintiffs were not given applications because of their race.[43] The only evidence supporting the plaintiffs'

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[42]For example, plaintiff Chris Harris testified that she and two other blacks were able to obtain applications in October 1984. Plaintiff Linda Davis testified that although she was not able to procure an application, her sister and another person obtained applications. Plaintiff Bobbie Sharp testified that while she was not able to obtain an application in mid-1984, she did obtain an application from D & L in mid-1983; Sharp also testified that on the latter occasion, she saw other blacks filling out applications. Thomas Hardy, a D & L employee, testified that his wife procured an application from D & L in 1984, while Malcolm Smith testified that he obtained an application October 2, 1982 and was hired the next month. Kimroy Williams, a D & L employee, testified that three of his relatives applied for employment with D & L during the Grizzard years.

[43]The plaintiffs also complain that the application procedures instituted by Haynes when she became personnel manager—making all applicants come to the plant, refusing to allow employees to take blank applications home with them—were intended to harm potential black applicants. However, D & L demonstrated that it had legitimate, nondiscriminatory reasons for changing the application process. For example, Haynes testified that when she allowed employees to take applications from the plant, many were never returned. She also stated that making potential employees come to the plant to obtain and complete applications helped to ensure that the people applying actually wanted the job, had transportation to

(continued...)

allegations that D & L refused to give blacks employment applications is the plaintiffs' unsupported assertions concerning their collective belief that D & L discriminated against blacks.[44] Under D & L's application policy, *see* part I.A *supra,* there were legitimate, nondiscriminatory reasons why D & L did not give applications to the plaintiffs. Because the plaintiffs failed to demonstrate that race was the true reason for D & L's refusal to give them applications, we uphold the district court's finding that D & L did not discriminate against the plaintiffs. *See Odom v. Frank,* 3 F.3d 839, 849 (5th Cir.1993) (holding that anecdotal evidence and mere speculation will not support a finding that an employer followed an unwritten "policy" of discrimination); *Carroll,* 708 F.2d at 195-96 (noting that the mere suspicion of discrimination is not sufficient to establish disparate treatment).

B

Plaintiffs Chris Harris and Bobbie Sharp contend that D & L unlawfully discriminated against them on the basis of race by refusing to hire them for production positions. The district court found that D & L did not hire Harris and Sharp for valid, race-neutral reasons. For

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[43](...continued)
and from the plant, and could read and write. The district court credited her testimony, and this finding is not clearly erroneous.

[44]For example, although Miller Slaughter testified that D & L did "a lot of discriminating," she would not consider a company that has a large percentage of black employees to be acting discriminatorily. Melvin Shaw testified that he was discriminated against simply "because [he] knew [he] was qualified to work [at D & L] but ... didn't even receive an application." Moreover, the plaintiffs uniformly testified that neither Haynes nor D & L's security guards treated them in a harsh manner or directed derogatory or vulgar language at them.

example, Harris, who applied when D & L was hiring only for the night shift, indicated on her application that she attended afternoon and evening classes at a local college. Haynes testified that she believed she did not hire Harris because of the conflict between Harris's classes and the shift for which she was hiring. The district court noted that although Haynes's explanation was not absolute, no evidence suggested that race affected Haynes's decision not to hire Harris. This finding is not clearly erroneous. *See Odom,* 3 F.3d at 845 ("Although Strader's testimony ... was less than absolute, it constituted at least *some* evidence. More significantly, it was uncontradicted. As Odom adduced *no* evidence favorable to his position ..., we are compelled to accept Strader's legitimate, non-discriminatory explanation...."); *cf. St. Mary's,* --- U.S. at ---- n. 5, 113 S.Ct. at 2751 n. 5 ("The notion that every reasonable employer keeps 'personnel records' on people who never became personnel, showing *why* they did not become personnel (*i.e.,* in what respects all other people who were hired were better) seems to us highly fanciful—or for the sake of American business we hope it is."). Likewise, Sharp failed to adduce any evidence indicating that D & L unlawfully considered her race when deciding not to hire her. Moreover, at the same time Harris and Sharp were not hired, D & L hired other blacks as production workers. Thus, the district court's finding that D & L did not discriminate against her is not clearly erroneous. *See Carroll,* 708 F.2d at 195 (noting that the mere suspicion of discrimination does "not establish disparate treatment").

Plaintiffs Nathaniel Cannon, Michael O'Neal, and Gregory Townsend contend that D & L unlawfully discriminated against them by refusing to rehire them

after they had been laid off.[45] The district court found that these plaintiffs adduced no evidence indicating that race was a factor in D & L's decision not to rehire them. In fact, the record indicates that D & L rehired twenty-two blacks, and only fourteen whites, during the Grizzard years. We hold that the district court did not err in finding that D & L did not rehire Cannon, O'Neal, and Townsend because of legitimate, race-neutral reasons. *See Carroll,* 708 F.2d at 195 (noting that the mere suspicion of discrimination does "not establish disparate treatment").

C

Plaintiffs Moses Coleman, Richard Grant, Earnest Hall, Robert Melvin, Alexander Smith, and Kimroy Williams claim that D & L, in failing to promote them to leaders and foremen, discriminated against them on account of their race. The district court found that the plaintiffs failed to demonstrate that race played any part in D & L's failure to promote them. This finding is supported by the record evidence.

In selecting leaders and foremen, D & L considered the employee's attitude, work record, work experience, leadership abilities, willingness to help other employees, commitment to the Company, and seniority to be very important. The record reflects that each plaintiff was lacking in one or more of these attributes during the Grizzard years. *See Davis v. Chevron U.S.A., Inc.,* 14 F.3d 1082, 1087 (5th Cir.1994) (noting that to establish a prima facie case of discrimination, an applicant must be qualified for the sought position *at the time* he or she applies

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[45]Cannon, O'Neal, and Townsend were not entitled to be recalled under the terms of D & L's collective bargaining agreement.

for it). For example, Gerald Bardwell, Coleman's supervisor, stated that Coleman, when temporarily filling in for foremen, was unable to handle the job and had employees "goofing off on him." Howard Watson testified that department supervisors never recommended Coleman for promotion. Additionally, both Grant and Hall had both turned down previous offers of promotion to leader positions, indicating a lack of commitment to D & L.[46] Charlie West, a black supervisor, testified that he did not consider Grant for one promotion because he did not know Grant. Byron Kyle, a department superintendent, testified that Grant did not have any leadership abilities.[47] Richard Williams, a black supervisor, and Howard Watson testified that Melvin and Kimroy Williams did not show any interest in being promoted and did only enough work to get by, thereby demonstrating little desire for advancement and no commitment to the Company.[48] Tommy Lucas, a foreman in the paint department and former union steward, testified that Smith had an attitude problem.

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[46]Hall challenges D & L's assertion that he rejected an offer of a promotion. However, Grizzard and Howard Watson, the production manager at the time, both testified that Hall did turn down a promotion because the promotion would have required Hall to work on the second shift. The district court credited this testimony over that of Hall. This determination was not clearly erroneous. *See Anderson*, 470 U.S. at 574, 105 S.Ct. at 1511-12.

[47]Moreover, Grant admitted that he was not qualified for promotion until 1985. However, he filed an EEOC charge in 1984 alleging that D & L failed to promote him for discriminatory reasons. Grant explained this inconsistency by stating that he did not read the EEOC charge before he signed it and thus had no idea what the charge alleged.

[48]After D & L noticed a change in Williams's attitude in 1987, the Company promoted him.

The plaintiffs failed to demonstrate that their race played any role in D & L's failure to promote them. *See Carroll*, 708 F.2d at 196 (rejecting a claim that an employee was discriminatorily denied promotion because his supervisors testified that his attitude and lack of dependability were the actual reasons); *Pouncy*, 668 F.2d at 795 (rejecting an employee's promotion claim because the employee did not possess the initiative or the ability to communicate with and train his co-workers). At most, the plaintiffs proved that D & L may have overlooked one or more of them when considering potential candidates for promotion. Such a showing is insufficient to prove discrimination. *Cf. Odom*, 3 F.3d at 849-50 (noting that the perpetuation of a "good old boy" network does not amount to racial discrimination). Accordingly, the plaintiffs failed to prove that D & L did not promote them on account of their race.

D

Daniel Anderson, Jr. and Tommy Hardy argue that D & L refused to give them temporary upgrade assignments in the general maintenance or rack maintenance departments because of their race. Welding experience was necessary for many of the tasks performed by general maintenance employees, and welding was the primary duty of rack maintenance employees. The district court found that D & L did not give Anderson and Hardy temporary upgrade assignments because they lacked the necessary experience to work in the maintenance departments.

Both Anderson and Hardy testified that they had

only a limited amount of welding experience.[49] Moreover, they presented no evidence demonstrating that what little welding experience they had qualified them to perform the duties of general and rack maintenance employees. Finally, they introduced no evidence suggesting that any white employee who received an upgrade was unqualified (or less qualified than the plaintiffs). Because the district court's finding that Anderson and Hardy were not qualified to receive temporary upgrades is not clearly erroneous, the district court's conclusion that Anderson and Hardy failed to establish a prima facie case of discrimination is supported by the evidence.

Anderson further contends that D & L discriminated against him by not permanently promoting him to the rack maintenance department. Anderson and James Bruce, a white employee, submitted bids for a permanent rack maintenance position. Both Anderson and Bruce were interviewed. The notes of the interviewer indicated that he considered Anderson's limited welding experience, Bruce's more extensive welding experience, Anderson's "poor attendance," and Bruce's "very good" attendance in determining who to recommend for the promotion.[50] Moreover, the notes also indicate that a black employee with more seniority than Bruce turned down the job.

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[49]Hardy testified that he had done some welding in an auto body shop and took high school welding classes in the early 1970s. Anderson also admitted that he had little welding experience, although he had taken "mechanics" classes in high school.

[50]The plaintiffs, without citing any authority, contend that the district court erred in relying on these notes because the interviewer never testified. However, the notes were attached as an exhibit to a joint stipulation submitted to the court by both parties. Because the stipulation stated that both it and the attached "exhibits shall be received in evidence at the trial of this case," the plaintiffs' contention is without merit.

Thus Anderson did not establish a prima facie case of discrimination because he was not qualified for the promotion which he sought.[51] Moreover, even if Anderson did establish a prima facie case, D & L demonstrated by a preponderance of the evidence that it rejected Anderson for legitimate reasons. Accordingly, the district court properly found that Anderson failed to demonstrate that he was the victim of discrimination.

E

Four plaintiffs—Belinda Cox, Robert Haywood III, Synovia Jackson and Jesse Overstreet—contend that the district court erred in finding that D & L did not discharge black employees under its garnishment policy, *see* part I.D *supra,* in retaliation for filing EEOC charges.[52] To establish a prima facie case of retaliatory discharge under § 2000e-3(a) of Title 42,[53] a plaintiff must demonstrate (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action

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[51]Anderson also argues that he had experience "fixing" D & L machines and therefore was qualified for the promotion. However, Wallace Bailey, the maintenance department superintendent, testified that Anderson's experience "fixing" machines simply involved routine preventive maintenance duties performed by all D & L employees and was not similar to the duties performed by maintenance department employees.

[52]The plaintiffs do not appeal the district court's conclusion, based on our holding in *Carter v. South Central Bell,* 912 F.2d 832 (5th Cir.1990), *cert. denied,* --- U.S. ----, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991) that their claims of retaliatory discharge were not actionable under § 1981.

[53]This section prohibits an employer from "discriminat[ing] against any of his employees ... because [the employee] has made a charge ... under this subchapter." 42 U.S.C. § 2000e-3(a).

occurred, and (3) that a causal link between participation in the protected activity and the adverse employment decision exists. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir.1992). Once a plaintiff establishes a prima facie case, the employer bears the burden of articulating some legitimate, nondiscriminatory reason for its action. *Id.* If the defendant does so, the employee bears the ultimate burden of showing that the reasons given by the employer were a pretext for retaliation. *Id.*

The parties appear to agree that the plaintiffs passed the first two prongs of the retaliation test, as they filed EEOC charges and subsequently were terminated from their positions.[54] They disagree, however, about the causal link between their terminations and the filing of the EEOC charges. The plaintiffs argue that but for the filing of the EEOC complaints, they would not have been fired. D & L counters by arguing that there is no causal connection between the plaintiffs' terminations and their protected activities. D & L further argues that even if the plaintiffs did establish a prima facie case of retaliation, it articulated a legitimate, nondiscriminatory reason for their discharges—violations of the garnishment policy.

The district court found that the plaintiffs failed to show a causal connection between the filing of the charges and their terminations. The district court further found that the evidence demonstrated legitimate, nondiscriminatory reasons for the plaintiffs' terminations—violations of the garnishment policy. These findings are not clearly erroneous. It is undisputed that

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[54]Haywood did not file EEOC charges, but his father did.

the plaintiffs did in fact violate the garnishment policy.[55] Because the penalty for such a violation was termination, D & L properly terminated the plaintiffs. *See Lewis*, 750 F.2d at 1279 (holding that when some evidence substantiates a claim of retaliation while other evidence demonstrates that the employer acted for innocent reasons, the district court did not clearly err in rejecting the retaliation claim).

The plaintiffs argue their terminations are causally related to their protected activity because D & L did not discharge other employees who violated the garnishment policy if those employees or their relatives had not filed EEOC charges. The plaintiffs point to seven individuals whom they argue should have been discharged under the policy but were not. Six of the individuals named by the plaintiffs, however, did not violate the garnishment policy.[56] Moreover, the mere fact that one individual

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[55]Jackson argues that D & L terminated her one day before the 30-day grace period for her fourth garnishment expired. Haynes, however, testified that she measured the grace period monthly—i.e., if an employee was notified of a garnishment on the fifth day of one month, the grace period expired on the sixth day of the following month. Thus, while the grace period usually was 30 days, in some instances it actually was either 29 or 31 days. Because Jackson was notified of her fourth garnishment on February 12, 1985 and fired on March 13, her termination was totally consistent with D & L's customary application of the garnishment policy.

[56]The plaintiffs contend that D & L would have discharged Charles Daniels, Larry Drake, Hazel Lofton, Alice Stapleton, Larry Wesley, and Eddie Williams had the garnishment policy been applied nondiscriminatorily. However, the district court found that Daniels did not violate the policy because Haynes, in applying the policy, did not count garnishments that employees received before she became personnel manager; Drake, Lofton, and Williams did not violate the

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violated the policy without being fired, does not by itself amount to race-based discrimination. *See Lewis*, 750 F.2d at 1278 n. 19 (finding that irregular exceptions to a valid policy did not support a retaliation claim); *cf. Odom v. Frank*, 3 F.3d 839, 850 (5th Cir.1993) (noting that "misfeasance, malfeasance, or nonfeasance—without nexus to ... race—is not actionable"). Furthermore, contrary to the plaintiffs' contention, the evidence indicates that D & L discharged under the garnishment policy other black employees who had not filed EEOC claims.[57] Additionally, the plaintiffs presented no evidence suggesting that D & L did not discharge white employees who violated the policy. Consequently, the district court did not err in finding that no causal link existed between the filing of the EEOC charges and the plaintiffs' discharges. We therefore uphold the district court's finding that D & L

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[56](...continued)
policy because the thirty-day grace period for the fourth garnishment extended over two years beyond the date that they received their first garnishment; Williams did not violate the policy because his fourth garnishment was released before the end of the thirty-day grace period; Stapleton filed a bankruptcy petition, which barred D & L from counting the garnishments against her; and Wesley did not violate D & L's garnishment policy either because Haynes did not count garnishments received before she became personnel manager or because Haynes simply misapplied the policy. After reviewing the record, we have determined that these findings are not clearly erroneous. Moreover, Lofton was the sister of Robert Melvin, who not only filed EEOC charges but was a named plaintiff in this suit. This fact is wholly inconsistent with the plaintiffs' contention that D & L discharged under the garnishment policy only those black employees who filed EEOC charges themselves or had close relatives do so.

[57]D & L discharged Lester Archie, James Humphrey, and Jimmie James for violations of the garnishment policy. Moreover, D & L discharged Humphrey on the same day that it discharged plaintiff Belinda Cox.

did not discharge the plaintiffs in retaliation for their participation in protected activity.

IX

The plaintiffs failed to produce sufficient evidence demonstrating that D & L engaged in any race-based discrimination. Accordingly, we **AFFIRM** the judgment of the district court in all respects.

JOHNSON, Circuit Judge, dissenting in part:

But for the fact that this case involves people's lives, the district court's findings and the majority's affirmance thereof would appear more humorous than juridical. However, the facts here clearly show that there have been scores of individuals who have endured racial discrimination at the behest of Douglas and Lomason ("D & L"). Many of these individuals have been pressured by the president of the company to drop this cause of action "for the good of the company." Instead of bowing to the company president's threats of closing the plant and laying off hundreds of people because of this lawsuit, the plaintiffs have stood up for what they believed to be their rights to equal employment. They sought their day in court only to have the district court and the majority ignore well-settled law, create facts, and reach conclusions which have no basis in the record or in logic. This writer is constrained to dissent.

A. Disparate Impact in Hiring

1. The Law

The most appropriate place to begin an analysis of disparate impact claims is the law. The seminal disparate

impact case, *Griggs v. Duke Power Co.,* explained that Congress' objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. 424, 429, 30 (1971). The Court went on to determine that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158. According to the Court, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432, 91 S.Ct. at 854.

The Court elucidated the proof requirements for disparate impact cases in *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). It ruled that for a Title VII plaintiff to successfully present a disparate impact claim, he or she must point to a particular employment practice that has created such disparate impact. *Id.* at 657, 109 S.Ct. at 2124-25. The plaintiffs in *Wards Cove* alleged that the practices in question were, *inter alia,* nepotism, the creation of separate hiring channels, the practice of preferential treatment in rehiring, and the use of subjective decision making. *Id.* The Supreme Court concluded that the plaintiffs had properly presented a disparate impact claim by pointing to such practices which, if proved, would support a finding of racial discrimination. *Id.*

2. Alleged Discriminatory Employment Practices

In the instant case, the district court concluded that Plaintiffs had failed to identify which of D & L's

employment practices adversely impacted African Americans. The majority asserts that the Plaintiffs did, in fact, identify an employment practice—namely, D & L's policy which requires applicants to complete applications at the plant. However, the majority asserts that such a practice could not justify resort to the disparate impact theory. Maj. slip op. at 4792.

The record belies the conclusions of both the majority and the district court. The pretrial order, signed by the district court, agreed to by counsel for each party, and filed just over one month prior to the trial, states plainly, "Plaintiffs allege that the defendant company has discriminated against blacks in hiring, both by restricting access to application forms and by failing and refusing to hire those blacks who are permitted to fill out application forms on the same basis as whites who fill out application forms." R. at 2590. Restricting access to application forms and using different hiring standards for blacks, as opposed to whites, are both employment "practices" which justify the application of the disparate impact theory to the facts of this case.

3. Anecdotal Evidence

The majority "found" that the "record contains no evidence indicating that D & L's application procedures affected potential black applicants any differently than potential white applicants." Maj. slip op. at 4793. Reading the record reveals otherwise. The record quite readily shows that D & L's application procedures almost exclusively affected blacks. D & L's expert, Dr. Joan Haworth, testified that the hiring practices initiated by Patty Haynes—specifically the restriction of application forms—caused "wild fluctuations" in the percent of black

applicants who were hired.[1] The defense "hung its hat" on this explanation. In its argument to the district court during its Rule 41 motion, D & L's attorney contended that Patty Haynes' change in the hiring procedures *alone* was enough to cause the change in the proportion of black hires from the pre-Grizzard era.

D & L's—and Plaintiffs'—contention that Ms. Haynes practice of restricting access to application forms caused the changes in black hires at the Cleveland plant is completely substantiated by the record.[2] D & L and Plaintiffs introduced into evidence dozens of depositions of black individuals who had attempted to obtain, but who were refused, applications from D & L when the company was hiring. Many of the deponents identified black friends and/or family members who were also denied the opportunity to file applications.[3] In all, Plaintiffs identified more than fifty blacks to whom D & L refused

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[1]Prior to James Grizzard's arrival at the Cleveland plant, 64.6% of those hired for general factory jobs at D & L were black. When Mr. Grizzard became plant manager, that number dropped to 46.5%. After Mr. Grizzard left, the black hires rose to 61.1%.

[2]Even the district court recognized that Patty Haynes' employment practices may have adversely affected blacks. In discussing the fact that the percentage of black hires dropped significantly during the Grizzard years, as compared with the pre-Grizzard years, the court concluded, "Finally, plaintiffs' analysis in this instance fails to take into consideration the difference in the practices and procedures initiated by Ms. Haynes which were in effect during the Grizzard years and differed substantially from what was done by her predecessor." Op. at 18-19.

[3]The district court correctly recognized that these statements are hearsay in nature. However, it neglected to recognize that D & L never objected to the introduction of the depositions on that basis or on *any* basis.

applications. The vast majority of these people attempted to obtain applications numerous times. Many of them asserted that they became discouraged and stopped trying to obtain applications. Further, there is no dispute that a great number of them sought to apply for jobs at D & L when the company was hiring. Reviewing this evidence, the majority properly claims that "the black individuals turned away at the *gate* by D & L guards never saw D & L give any applications to whites seeking employment." Maj. slip op. at 4793 (emphasis added). However, that finding probably provides little comfort to the blacks who testified that they not only saw whites obtaining applications, but also saw whites being *hired* at the same time that blacks were being turned away in the *personnel office*—as opposed to the *gate*.[4]

One would think—and the law certainly requires—that the restriction of applications would impact on whites equally. However, such is far from the case here. As compared to the two and one-half score blacks who were refused applications, D & L presented the

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[4]For example, J.C. Evans, a black man, stated that he followed Bobby Jolly, a white school mate, into the personnel office. He saw Patty Haynes talking to Jolly and a group of approximately ten other white individuals. Mr. Evans could not hear what Ms. Haynes told the white applicants. However, as Jolly started to leave the area, he passed Evans and informed Evans that he, Jolly, had been hired. Patty Haynes told Evans to come back the next day. He left without an application, and when he returned the following day pursuant to Ms. Haynes' instructions, he was told that the company was not hiring.

Likewise, Ms. Lizzie White, a black woman, explained in an affidavit that she visited the personnel office at the same time that Teresa Boswell, an acquaintance who was white, visited the office. Ms. Boswell not only obtained an application, but she was also hired the same day. Ms. White was turned away without an application.

resounding number of *three* whites who had been refused applications. Although dozens of blacks sought to obtain applications while the company was hiring, not one of the white potential applicants sought an application during such periods.

4. Statistical Evidence

a. The Law

The disparate impact model usually focuses on statistical analysis. *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 987, 108 S.Ct. 2777, 2784-85, 101 L.Ed.2d 827 (1988). Statistical data is probative, however, only if it properly compares relevant elements. *See Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Wards Cove,* 490 U.S. at 651, 109 S.Ct. at 2121 (quoting *Hazelwood,* 433 U.S. at 308, 97 S.Ct. at 2741-42). However, where labor market statistics are impossible to ascertain, the Supreme Court has recognized that "certain other statistics—such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs—are equally probative for this purpose." *Id.*

b. The Facts

All agree that the best comparison in this case would be the racial composition of the applicant flow into D & L for general factory jobs as compared with the racial composition of the general factory hires. The district court found that such a comparison is possible. The majority, in mantra-like repetition, found no clear error in that finding. Both are wrong.

Fewer than two years after the filing of this lawsuit, Patty Haynes testified during a deposition that she started to retain all of the applications after she learned that some employees filed EEOC charges in October of 1984. She explained that she threw away a number of applications just prior to that time, and she was not sure whether she also threw away some of the applications which were filed during the five months preceding the filing of the EEOC charges.

Statistics, which D & L did not dispute, confirm that Ms. Haynes failed to retain all of the applications. Ms. Haynes testified, and the district court found, that she, as a general rule, would accept twelve to fifteen applications per seven hires. This was a fairly constant practice, and once she adopted this practice, she did not deviate therefrom throughout her tenure as personnel manager. The application data which exists after the EEOC charges were filed (October 17, 1984) are consistent with Ms. Haynes' explanation of her practice: Of the applications on hand, almost forty percent came from unhired applicants. Hence, for every six hires, Ms. Haynes was able to consider ten applicants. The application information for the period prior to the filing of the EEOC charges presents a vastly different picture. Of the applications on hand which were filed prior to October 17, 1984, only twenty-two percent were filed by unhired applicants. Contrary to Ms. Haynes' explication of her practice of accepting twelve to fifteen applications per seven hires, and contrary to the district court's acceptance of that explanation, Ms. Haynes would have been required to hire four people out of every five applicants throughout that period.

The difference in the applications is not only substantial, but it is also statistically significant. Dr. Charles Mann, a statistician, testified—and D & L did not

dispute—that all things being equal—and according to Ms. Haynes, all things *were* equal—there were only four chances in *one thousand* that all of the applications existed.[5] Dr. Mann's calculation reveals that Ms. Haynes' uncertainty about her retention of all of the applications was well-founded.[6]

Even if all of the applications were available—and they clearly are not—reliance on the applications would be inappropriate in light of the fact that the company disproportionately restricted black potential applicants' access to the forms. Barriers and/or practices which deter qualified minorities from applying for jobs impermissibly taints any analysis which employs the use of actual applicant-flow data. *Dothard v. Rawlinson*, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977) ("The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying" because of the alleged discriminatory practices); *see Ward's Cove*, 490 U.S. at 653, 109 S.Ct. at 2122-23 ("*As long as there are no barriers or practices deterring qualified nonwhites from applying* ... if the percentage of selected applicants who

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[5]Notably, when she testified in a sex discrimination case prior to the trial of this case, Dr. Haworth performed a similar analysis which determined the existence of all applications for a certain period of time.

[6]Dr. Haworth, who had no personal knowledge of the retention of the applications, was the only witness to claim that all of the applications existed. However, she spoke with great diffidence. *See, e.g.*, Trans. Vol. 22 at 1714-15 ("For that period of time [of May 4, 1984 through January, 1985] I have the applications of the nonhired people and the applications of the hired people, as far as I can tell *to the extent that they exist.*" (emphasis added)); *Id.* at 1718 ("[T]hese are the pools for which I *believe* I have the nonhired applications *to the extent that they're available.*" (emphasis added)).

are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." (emphasis added)). In light of D & L's restrictions on blacks' attempts to obtain applications, the true applicant-flow information cannot form the basis of the statistical analysis in this case.[7]

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[7]Dr. Haworth's statistical analysis is infirm for a number of other reasons, as well. First, when cross-examined by Plaintiffs' counsel, she admitted that she excluded 11 applications which were undated. (Failing to date an application was not fatal. Patty Haynes hired several people who forgot to place the date on their application.) Nine of those applications came from blacks. Additionally, Dr. Haworth included the application of a white person who sought a general maintenance mechanic position, not a general factory position—the position at issue here. Finally, in her statistical analysis of D & L's hiring practices for 1984, Dr. Haworth excluded the October-November hiring period. She claimed that the white applicants in that period had greater blue collar and/or manufacturing experience than the black applicants. Patty Haynes, however, testified that prior plant production experience—which *none* of the white applicants possessed—not blue collar or manufacturing experience, was beneficial for applicants seeking general factory work at D & L. The district court did not adopt this rationale. It was correct in so doing.

The district court erred, however, in substituting its own rationale for the exclusion of the October-November applications. The court reasoned that because blacks began to file EEOC charges of racial discrimination in October 1984, the black community conspired to flood D & L with applications of black individuals so as to increase the black proportion of the applicant flow. The court's reasoning has no basis in logic or in the record.

Initially and importantly, the Supreme Court has discommended courts' supply of explanations for statistical disparities when those explanations neither have support in the record nor constitute

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[7](...continued)
valid judicial presumptions. *See infra* note 13; *see also Castaneda v. Partida*, 430 U.S. 482, 500, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). Speculative inferences and suppositions proffered by courts, as opposed to parties, are improper and impermissible. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 619, 621, 94 S.Ct. 1323, 1332-33, 1333-34, 39 L.Ed.2d 630 (1974).

In this case, the court's explication of its rejection of the October-November data and the majority's acceptance thereof are not only impermissible, but they are also quixotic. The explanation finds absolutely no support in the record. There is no testimony, no suggestion, no intimation in the record which remotely implies that numerous blacks applied for jobs at D & L to affect applicant-flow data. There is not even a suggestion that a greater proportion of blacks than normal applied for general factory positions in October 1984. In fact, when specifically informed about the number of applications filed by blacks and whites in October 1984 and her selection rate of those applicants, Ms. Haynes testified during her 1987 deposition that she knew no reason other than race for the disparity in hiring. Mr. Grizzard similarly testified in his deposition that he knew of no reason why the hiring rates for October 1984 were so favorable toward whites. Dr. Haworth testified that the EEOC investigation of D & L did not make the October 1984 applicant-flow data unreliable. She specifically stated that those numbers should *not* be discarded because the EEOC had been brought into D & L hiring matters. Finally, Dr. Haworth testified that the applicant-flow data did not "fluctuate wildly" in 1984. The availability of blacks, according to Dr. Haworth, was constant.

The district court's explication for his rejection of the October 1984 applications—that once blacks heard of the charges of discrimination at D & L, they flocked to apply for positions with the company—is also illogical. It assumes that the blacks in this Mississippi Delta area are masochistic idiots—that these blacks, like mosquitoes drawn to lights, are drawn to discriminatory environments. At the same time the district court's explanation assumes that the black applicants—people who applied for jobs which did not even

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Hence, the district court should have resorted to appropriate proxy information, which the Supreme Court has declared to be "equally probative." *Wards Cove,* 490 U.S. at 651, 109 S.Ct. at 2121-22.

Plaintiffs proffered seven different standards of availability which served as a proxy for the actual applicant-flow information. Four of those standards were particularly persuasive: 1) the Mississippi State Employment System ("MSES") referrals to D & L for 1985, 2) the fully registered persons with MSES,[8] 3) the number of general factory hires during the four and three-quarter years preceding Mr. Grizzard's arrival, and 4) the number of people in Bolivar County who are were employed as operators, fabricators, and laborers in factories other than

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[7](...continued)
require a high school education—understood that in proffering statistical proof in a disparate impact case, plaintiffs would want to have a greater minority presence in the applicant flow. According to the district court and the majority, Oliver Robinson, a man whom both parties stipulated was a paranoid schizophrenic, encouraged blacks to apply so as to skew the applicant flow. The district court's unsupported suppositions assume way too much, and in my view constitute clear, indeed patent, error.

[8]This standard excluded any individuals who were younger than 18 years old and who had any one of seven characteristics which might imply that they were not genuinely interested in employment. Individuals were excluded if they received welfare benefits or Food Stamps, if they were applying for Food Stamps, if they were in the WIN Project or the Summer Youth program, if they were migrant workers or had previously been coded as a migrant worker, or if they were receiving unemployment insurance.

D & L, as shown by the 1980 census.[9]

The first standard contains all of the application forms of all interested D & L applicants during the time period in issue which were on file with MSES. This standard is untainted by unfair restrictions on blacks' ability to obtain such applications.[10] The district court rejected this standard because it was "an extremely small sample." Interestingly enough, however, the court credited Dr. Haworth's statistical analysis of her "pools" of applications, and each such pool was smaller than the pool in this first standard.[11] The district court's rejection of this standard is directly antithetical to its acceptance of Dr. Haworth's pools. It is clearly erroneous. In my view, this standard provides a reliable barometer of the general D & L applicant flow during the periods in question. Indeed, Dr. Haworth, herself, testified that this standard, though not perfect, was valid.[12] The proportion of black applicants in this standard was 65.6%. When compared

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[9]My first and second relevant standards correspond to the Plaintiffs' and the district court's second and third standards of availability. My third and fourth standards correlate to their sixth and seventh standards.

[10]According to some black deponents, MSES would not permit them to file D & L applications. However, the MSES restrictions, though apparently only affecting blacks, are, in no way, as pervasive as D & L's restrictions.

[11]MSES referred 92 applicants to D & L. However, the largest application pool which Dr. Haworth analyzed contained 80 applicants. The second largest pool contained just 57 applicants. The other pools, in descending order contained 48, 43, 42, and 18 applicants.

[12]Although she had trouble including certain MSES referrals ("OJT's") in the pool, Dr. Haworth testified that she was *not* recommending that the OJT referrals be excluded from this standard.

with the actual number of blacks hired, the standard showed statistical significance at 8.8 standard deviations.[13]

The district court rejected the second standard, claiming that this standard is "heavily weighted" in favor of blacks because of their over-utilization of MSES. Dr. Haworth testified that a national study indicated that blacks in large urban areas generally are more likely to use public employment services than whites. She tempered her testimony with the caveat that she did not know whether this study was applicable to Bolivar County, which is small and rural. Dr. Haworth never claimed that the difference in the usage of public employment services between blacks and whites was statistically significant or even substantial. She did, on the other hand, testify that there might be only a trivial difference, or even no difference, in the usage of MSES by blacks and whites in Bolivar County.

Dr. Mark Bendick, Plaintiff's labor economist, testified that a study on the usage of public employment agencies in southern, rural areas—including Sunflower County, Mississippi, a rural county which is adjacent to Bolivar County—revealed that the public employment service usage in southern, rural areas is quite different from such usage in large urban areas. While the study did not compare blacks' and whites' usage of employment services in rural areas, Dr. Bendick testified that no study shows that rural blacks use unemployment services at a disproportionately higher rate than rural whites. The

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[13]The Supreme Court has reiterated numerous times that standard deviations greater than two or three suggest suspect activity. *See Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 1281 n. 17, 51 L.Ed.2d 498 (1977); *Hazelwood*, 433 U.S. 299, 312 n. 17, 97 S.Ct. 2736, 2743-44 n. 17, 53 L.Ed.2d 768 (1977).

district court had no evidence contrary to Dr. Bendick's testimony on this subject, for the company did not even attempt to dispute the testimony. The district court's conclusion that the second standard is "heavily weighted" in favor of blacks due to their "over-utilization" of MSES is therefore highly speculative and goes far beyond the record. In light of the Supreme Court's disapproval of a court's supply of explanations of statistical information which is not supported by the record,[14] this Court should

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[14]In Title VII cases, the Supreme Court has consistently required parties, district courts, and circuit courts to base their decisions upon credible evidence or arguments which exist in the record. *See, e.g., Mayor of Philadelphia*, 415 U.S. at 619, 621, 94 S.Ct. at 1332-33, 1333-34 (noting that the circuit court's explanations constituted "supposition" and "speculative inference" which could not support a serious charge); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 438 n. 23, 95 S.Ct. 2362, 2382 n. 23, 45 L.Ed.2d 280 (1975) (asserting that a defendant's job relatedness claim "cannot be proved through vague and unsubstantiated hearsay").

In *Castaneda*, the Texas Court of Criminal Appeals proffered a theory which explained away a criminal defendant's charge of discrimination in grand jury selection practices. The Supreme Court rejected the State court's theory, deciding that even though the theory was generally applicable, the record was inadequate to support the use of the theory. The Court concluded that "under the facts presented in this case, the ... theory is not developed fully enough to satisfy the State's burden of rebuttal." The Court chose to rely on the record. *Castaneda*, 430 U.S. at 500, 97 S.Ct. at 1283.

Consistent with these cases, then Justice Rehnquist elucidated in his concurrence in *Dothard v. Rawlinson* that the employer in that case may have had a justifiable reason for employing the alleged discriminatory hiring practice. However, Justice Rehnquist explained that once the burden shifts to the employer, the employer—not the court—must articulate that reason. *Dothard*, 433 U.S. at 340, 97 S.Ct. 2732. In this case, the district court has repeatedly explained away Plaintiffs' case with reasons not proffered by the defense.

not countenance the judicial activism by the district court. No sufficient reason exists in the record—or otherwise, for that matter—for rejecting the overall MSES registrant information. This, the second standard of availability, reveals that 65% of the MSES registrants who were over eighteen and had none of the earlier-described characteristics were black—just six-tenths of one percent smaller than the proportion of blacks in the first standard. This standard demonstrates statistical significance at 8.5 standard deviations.

The district court ruled that in the third relevant standard of availability, Plaintiffs failed "to take into account the distinct *possibility* that the hiring rate prior to the period beginning October, 1982, *may* indeed have been discriminatory in favor of black applicants." Op. at 18 (emphasis added). Again, the district court improperly supplied reasons for ignoring Plaintiffs' statistical analysis which no party espoused or even adumbrated at any time throughout the trial or during depositions. *See supra* note 13.

The court further explained that the differences in Patty Haynes' employment procedures perhaps accounted for the change in employment rates of blacks. The district court's statement of the obvious is actually a recitation of the disparate impact theory. Its attempt to explain away Plaintiffs' reliance upon standard three in fact embraces Plaintiffs' Title VII claim. Apparently for all but the district court and the majority, acceptance of this standard is akin to a bird's nest on the ground. There is no difficulty whatever in accepting this standard. Likewise, there is no valid reason for disregarding it. Indeed, in light of the district court's back-door recognition that Ms. Haynes' practices may have caused the hiring disparities, there is every reason to consider this standard as a valid reference for a statistical analysis of

the disparate impact claim. This third standard, which shows that 64.6% of the hires were black, is just four-tenths of one percent lower than the second standard and equates to 8.3 standard deviations. The consistency of the first three standards is amazing and, in this writer's view, lends greatly to their credibility and probative value.

The final standard, though rejected by the district court, is much more precise than standards accepted by the Supreme Court in *Dothard v. Rawlinson* and *International Brotherhood of Teamsters v. United States.* Those cases compared the make-up of defendants' employees to the minority presence in the general population. In *Dothard,* the Supreme Court reviewed Alabama's penitentiary system for sex discrimination in hiring. The Court upheld the district court's reliance upon generalized, national statistics which demonstrated that Alabama's hiring system discriminated against women. *Dothard,* 433 U.S. at 329-331, 97 S.Ct. at 2726-28. Similarly, the *Teamsters* Court compared the proportion of minority employees with the proportion of minorities in the general, area-wide population. *Teamsters,* 431 U.S. 324, 337 n. 17, 97 S.Ct. at 1855 n. 17. The Court in *Hazelwood School District v. United States* explained that the *Teamsters* Court's use of general population figures was "highly probative" because the jobs in question were low-skill jobs, which almost everyone in the population could acquire. 433 U.S. at 308 n. 13, 97 S.Ct. at 2741-42 n. 13. The *Wards Cove* Court further explicated that "where figures for the general population might ... accurately reflect the pool of qualified job applicants, ... we have ... permitted plaintiffs to rest their prima facie cases on such statistics as well." 490 U.S. at 651 n. 6, 109 S.Ct. at 2121 n. 6.

The final statistical standard in this case is much

more probative than general population statistics,[15] for it hones that number down to the actual number of blacks who are not only in the general population, who are not only in the civilian labor market, but who also are qualified and have shown interest in the general factory-type work at issue in this case.[16] The district court's basis for rejecting this standard is completely unfounded and, in truth, nonsensical. The court first spurned this standard because it claimed that a comparison between *hired* people and *unhired* people was inherently unreliable. While such a comparison certainly is not perfect, the facts of this case clearly prove that such a comparison greatly favors D & L, not the Plaintiffs, for the unemployment rate among blacks in Bolivar County at all relevant times has far exceeded the unemployment rates of whites in the county.[17] Hence, the proportion of black-unemployed

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[15]A comparison of the number of black hires at D & L during the Grizzard years with the general Bolivar County population of people who are 16 years and older also reveals statistically significant disparities in the hiring. The analysis reveals a difference which constitutes 4.5 standard deviations.

[16]It is patently obvious—and even Dr. Haworth acknowledged—that because the black labor force in Bolivar County is heavily weighted in the low-skills jobs and has little presence in the "top rungs" of the employment ladder, the number of blacks eligible for production-worker jobs is much greater than the number of blacks in the Bolivar County civilian labor market. However, even comparison with just the black labor market reveals that there is just a little more than one chance in a thousand that D & L's hiring during the Grizzard years happened by chance—2.4 standard deviations. Dr. Haworth found that a comparison between the labor market and D & L's hiring was probative.

[17]In 1982, 4.3% of the white work force was unemployed. The black unemployment rate approached five times that number: 20.7% of blacks in the county were unemployed. Likewise, in 1984 unem-

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job-seekers would obviously exceed the proportion of black general factory workers.

The District Court also rejected this last standard because not all D & L applicants have prior production--worker experience.[18] The court noted that many applicants have employment backgrounds in the service or manufacturing industries. While the court's observation is entirely true, it is, at the same time, completely irrelevant to the issue at hand—what proportion of applicants at D & L were black, and hence what is a proper standard of availability for this case. Each applicant, regardless of his or her work experience, displayed interest in general factory work, just as those working in production--type jobs displayed such interest. While a comparison of the number of production workers with the number of applicants to service industry or manufacturing jobs would be unpersuasive—since those interested in the latter jobs might have no interest in the former job—the standard here focuses upon the interest which each person, whether worker or applicant, has shown in *general factory work*, the work at issue in this case. The district court's rationale for rejecting the final standard entirely misses the boat.

The last standard, which to me is completely valid, shows that 70.1% of the employees in general factory-type jobs in Bolivar County, excluding D & L employees, are black. Statistical significance, at 11.3 standard deviations,

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[17](...continued)
ployment rates showed that 4% of the whites were unemployed while 19.9% of the blacks were unemployed.

[18]The court disregarded any comparison with the blue collar and manufacturing work force for the similar reason that not all applicants possessed blue collar or manufacturing experience.

plainly shows that, like the other standards, the hiring results during the Grizzard years did not happen by chance.[19] Under any of these standards, it seems abundantly clear that Plaintiffs have successfully made out a *prima facie* case of race discrimination in D & L's hiring practices.[20]

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[19]Comparison with Bolivar County's civilian labor force (2.4 standard deviations), manufacturing labor force (5.2 standard deviations), and blue collar labor force (6.4 standard deviations) likewise demonstrates statistically significant hiring disparities. Dr. Haworth found such comparisons to be valid.

[20]Basing her conclusion upon the actual number of remaining applications, Dr. Haworth contended that only 45.5% to 46.7% of the D & L applications came from blacks. The district court and majority accepted these numbers, which should be rejected, not only because the applicant-flow data is incomplete and irrevocably tainted, as earlier discussed, but because the numbers are thoroughly illogical in light of the demographics in Bolivar County.

Although the majority of people in the civilian labor force, the manufacturing labor force, and the blue collar labor force in Bolivar County is black—51.9%, 58.2%, and 60.7% respectively—and only 3% of the professionals and managers in the county are black, the 45.5% to 46.7% range implies that the black labor force in the rural Mississippi Delta County of Bolivar is weighted more heavily at the "top rungs" of the employment ladder than at the bottom rungs. Logic, census data, and even Dr. Haworth, *see supra* n. 16, all agree that the opposite is true.

Dr. Haworth's numbers are not only "out of touch" with the demographics of Bolivar County, but they are vastly different from the applicant-flow data of factories which are in close proximity to D & L. Of the people MSES referred to Colortile for general factory jobs, 68.7% were black. Additionally, 84.4% of the applicants for general factory work in Baxter Travenol, which is located directly across the street from D & L, were black.

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5. Conclusion

D & L, in essence, conceded Plaintiffs' disparate impact[21] case in hiring by agreeing that the changes Patty Haynes made in her hiring practices—namely, her restriction of application forms—resulted in the significant change in the proportion of blacks hired. Even without such a concession, all credible evidence demonstrates that D & L's hiring during the Grizzard era was discriminatory with respect to race. This Court should therefore reverse

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[20](...continued)

Dr. Haworth's data is also inconsistent with Patty Haynes' experience. For example, Haynes testified that on one occasion, she invited everyone to apply for general factory jobs at a mass application distribution. Three to four hundred people stood in the snow on that February 1983, morning to apply for a job. Haynes testified that there were many more blacks than whites; many more than 51% of the applicants were black.

All in all, any comparison between the standard of availability which Dr. Haworth generated and any valid, reliable indicator of the proportion of blacks who showed interest in the production worker jobs at D & L confirm that Dr. Haworth's numbers are wrong. Her analysis should be rejected as fallacious and contrived. Only jaded or, perhaps, closed eyes could decide otherwise.

[21]The majority rebuffed Plaintiffs' disparate treatment claim, finding basically no use of racial epithets. Notably, however, the record shows that epithets were, in fact, used by certain management personnel. James Grizzard testified in a deposition, which neither the district court nor the majority read, that he regularly called black employees "boy." Grizzard believed the term to be a friendly one. Patty Haynes testified that she heard blacks complain that Tom Garner, the plant production manager during the Grizzard years, called them "boy." Further, one of D & L's black supervisors testified that he had a foreman who, during the Grizzard years, told racist jokes. The district court and majority apparently ignored this testimony.

on this issue and remand for the district court to decide damages.

B. Promotions

1. Proper Labor Pool

Like the district court's analysis and the majority's review of the hiring data, this writer finds that the analysis and review of the promotion statistics are greatly misleading. The majority, quoting *Lewis v. National Labor Relations Board,* correctly sets forth the proper statistical framework upon which claims of promotion discrimination claims must be based: "In establishing an inference of discrimination from statistical evidence, the 'required comparison [is] to a *qualified* pool of employees *presumptively eligible* for promotion.'" Maj. slip op. at 4798 (quoting *Lewis,* 750 F.2d 1266, 1275 (5th Cir.1985) (emphasis in original)).

Unlike this case, in both *Lewis,* which this writer authored, and *Pouncy v. Prudential Insurance Company of America,* to which the majority refers, there were minimum objective qualifications for promotions which precluded comparison of the proportion of minorities promoted to the proportion of minorities in the overall work force. The promotion pool was smaller than the entire work force. In *Pouncy,* only those employed at level eleven could be promoted to level twenty. *Pouncy,* 499 F.Supp. 427, 454 (S.D.Tex.1980), *aff'd,* 668 F.2d 795 (5th Cir.1982). Similarly, in *Lewis,* only employees who had reached the GS-12 field examiner level or the GS-13 field attorney level were "presumptively eligible" for promotion. *Lewis,* 750 F.2d at 1275. Comparison with the entire work force in those cases was improper, since not all of the employees had reached the required employment level for promotion.

This case is quite different. Here, every production worker is "presumptively eligible" for promotion to the leader positions in question, and every leader is "presumptively eligible" for promotion to the foreman positions in question. There is no educational, skill, or other objective requirement for promotion to those positions at D & L.[22] With the exception of the attendance record,[23] all of the "qualifications" which the D & L supervisors thought were important were entirely subjective.[24] An unsupported claim that blacks possess

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[22]In fact, James Grizzard—plant manager of the Cleveland plant from 1982 to 1986 and executive manager over two plants at the time of trial—dropped out of high school after the tenth grade and attained a GED thereafter. He did not possess any type of college degree. Indeed, he never even attended college.

[23]Although attendance was a good reason for rejecting blacks for promotion, it apparently was not a sufficient reason for rejecting whites. For example, Plaintiff Richard Grant was purportedly a good worker whom James Grizzard recommended for promotion. According to Robert Goodman, a plant supervisor, Grant had a good attendance record. However, a promotion for which Grant was considered went to Jerry Swinford, a white employee. Swinford had worked at D & L for just 14.6 months at the time of his promotion. During those 14 months, Swinford reported off for sickness 11 times, reported off for personal business six times, came to work late three times, left early twice, and was AWOL once.

Another example is James Bowen, who was hired as a foreman after meeting Mr. Grizzard in the all-white VFW Club. During his eighteen months on the job, Bowen left early or left and returned 19 times and came to work late eight times.

[24]D & L supervisors testified that plant experience and seniority were important considerations for promotion. James Grizzard testified in a deposition that plant experience was a big consideration. Even so, nine people with fewer than five months' experience were

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[24](...continued)
promoted to leader during the Grizzard years. Four of the nine had worked at the plant fewer than two months. All nine were white.

Howard Watson and E.W. Tolbert, both supervisors, testified that prior to James Grizzard's arrival, they had never seen such inexperienced people promoted. Wallace Bailey, the assistant supervisor over the maintenance department, testified that he did not know anyone in the pre-Grizzard period who was promoted without having "some years'" experience as a production worker.

The lack of experience of the leaders and foremen in the plant hurt the productivity of the plant. Soon after James Grizzard arrived, Harry Lomason, president of D & L, wrote Mr. Grizzard to inform him that the quality and manufacturing systems were out of control. In August of 1983, Ford Motor Company informed D & L that it had serious concerns about the quality of work coming from the Cleveland plant. One of the D & L vice presidents wrote D & L plant managers in February 1985 to give them guidance on fixing the on-going quality problems. One of the causes of the plants' problems was "insufficient training or personnel (production and supervision)." Mr. Grizzard testified in his deposition that he did nothing different after receiving this letter. Eight months later, Harry Lomason wrote Mr. Grizzard and three other individuals that D & L's standing and reputation with Ford was "at an all-time low." Mr. Grizzard affirmed that Mr. Lomason's statement was directly applicable to the Cleveland plant. 'Tis notable, indeed, that soon after this letter was written, the supervisors at the Cleveland plant began to promote more experienced workers.

Finally, this writer notes that in computing the number of months' experience of those promoted during the Grizzard years, the majority apparently included the demotion of Larry Vardaman, who had been at the plant for 194.8 months before he was *demoted* from the position of foreman. Vardaman had twice been promoted to foreman prior to Grizzard's arrival. The majority's inclusion of Vardaman in its calculation is erroneous. Absent Vardaman's demotion, the evidence shows that the whites who were promoted

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these subjective characteristics at a substantially lower proportion than whites is, in itself, a discriminatory claim in which the district court and the majority apparently find solace.

D & L's entire work force, which was approximately 70% black, is the proper pool to which the promotions should be compared,[25] for that is the pool from which promotions came.[26] At no time have promotions approximated 70%. Interestingly enough, however, prior to Mr. Grizzard's arrival at D & L, 63.8% of the promotions went to blacks. That number plummeted to 22.7%[27] during his tenure as plant manager and returned to 63.7% after Plaintiffs filed this lawsuit. When asked why the number of black promotions had declined so drastically,

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[24](...continued)
during Mr. Grizzard's tenure, indeed possessed an average of approximately 15 months' experience at the time of their promotion.

[25]The proportion of blacks at the production-worker level exceeds the proportion of blacks hired in that position. Dr. Haworth and Dr. Bendick explained that a much greater number of whites voluntarily quit their employment with D & L than blacks. Ms. Haynes confirmed this, testifying that many whites quit soon after they are hired. On average, blacks are employed at D & L twice as long as whites. Over time, the longevity difference has resulted in a much higher percentage of blacks in the company than whites.

[26]The district court claimed that such a comparison disregarded the company's practice of hiring individuals from outside the plant. However, the district court disregarded Mr. Grizzard's deposition testimony that D & L's practice was to promote from *within* the company.

[27]The district court included salaried supervisors in its review of Plaintiffs' promotion claims. Such inclusion of supervisors is clearly erroneous. Plaintiffs have never claimed that D & L discriminated on the basis of race in promoting supervisors.

neither Mr. Grizzard nor any supervisor so questioned could offer an explanation.

Contrary to the majority's reliance on the fact that a number of blacks had turned down promotions, Byron Kyle, supervisor over one half of the plant, Howard Watson, production manager for the Cleveland plant, and Charlie Lofton, supervisor over the press area in the plant, all testified that prior to Mr. Grizzard's arrival, blacks and whites turned down promotions. They asserted that the number of people who turned down such promotions did not change during Mr. Grizzard's tenure or after his departure. In fact, a substantial number of blacks who turned down promotions during the Grizzard years had also turned down promotions during the pre-Grizzard years. These employees were repeatedly offered promotions.[28] Based upon such testimony, blacks' rejection of promotions could not be the reason for the stark decline in black promotions. Indeed, no supervisor ever even intimated that such was the case.

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[28]Hence, rejection of a promotion clearly did not disqualify an employee from future promotions. In fact, Howard Watson, production manager of the entire plant, testified that after he was first promoted to leader, he requested that he be returned to the production-worker level because he did not think that he could handle the job. He was later promoted again. Possessing one of the highest jobs in the Cleveland plant, Mr. Watson, himself, demonstrated that his rejection of a promotion was not fatal to his promotion opportunities. It should not have been fatal for Earnest Hall's or Richard Grant's promotion opportunities either. Indeed, Mr. Grizzard asserted in his deposition that after Richard Grant turned down the promotion to which the district court refers, Grant informed Grizzard that he, Grant, was again interested in being promoted.

2. Comparison With Supervisors in Bolivar County

Dr. Haworth, the district court, and the majority all agree that a comparison of the promotions at D & L with the percentage of blacks in supervisory positions in Bolivar County is more relevant than a comparison of the promotions to the applicable labor pool. It seems to me that only one with a jaundiced eye would find such a comparison to be persuasive.

According to Dr. Haworth, most of the supervisory positions to which she compared D & L's promotions were precision craft positions. The "bulk" of those positions were held by craftsmen and craftswomen. Dr. Haworth testified that blacks held only 33.4% of the precision craft jobs in Bolivar County. On the contrary, 70.1% of the general factory jobs belonged to blacks. To therefore compare the leader and foreman positions to precision craft, as opposed to the general factory pool from which the promotions in question came is like comparing apples to watermelons. The comparison is simply irrelevant.[29]

3. Conclusion

A proper analysis of this issue reveals that D & L improperly considered race in its promotion practices. D & L did not provide a race neutral reason why, when 70% of the promotion pool is made up of presumptively

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[29]The district court's finding that blacks were treated favorably during the pre-Grizzard years is likewise unfounded. The promotions in the pre-Grizzard years roughly reflects the pool of presumptively eligible employees.

qualified blacks, only 22.7% of the leader/foreman promotions went to blacks during Mr. Grizzard's tenure—a number which had dropped from 64.8%. Instead, in Houdini-like fashion, the company tried to make the promotion disparity disappear. Because there is no legitimate explanation for the decrease in minority promotions, Plaintiffs must prevail. This Court should reverse and remand for a trial on the damage issue here.

C. Temporary Upgrades to Rack/General Maintenance[30]

1. Qualified Employees

The majority's review of the temporary upgrade evidence borders between laughable and "cry-able." The majority's contention that welding experience was needed for both general maintenance and rack maintenance positions is completely refuted by Wallace Bailey, the assistant supervisor over the maintenance department. Bailey testified at trial that one who sought a temporary upgrade needed to have a mechanical background, have a familiarity with electrical equipment, have the ability to

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[30]Both the district court and majority included all craft positions in their analysis, as opposed to the general and rack maintenance positions which are at issue here. They also analyzed promotions for all craft positions, instead of the maintenance positions in question. When James Grizzard came to the Cleveland plant, 66.7% of these maintenance positions were held by blacks. That number decreased during his tenure to 54.1% black. Also, there were only three promotions in the maintenance positions during the Grizzard years. The proper comparison is therefore the 33.3% promotions which went to blacks as compared with the 54.1% of the blacks who were presumptively eligible for promotion. Although the majority's analysis is flawed, I agree that Plaintiffs did not prove whether the promotion disparity in the maintenance positions was statistically significant or that race discrimination played a part in the promotion decisions for rack and general maintenance.

understand written and verbal instructions, and *for rack*, as opposed to *general*, maintenance positions, possess welding experience. Bailey averred that one would not be disqualified if he did not possess all of these qualities. In fact, he asserted that he would not even exclude a person simply because that person could not weld. Nevertheless, the majority contends that no blacks were qualified for the general maintenance or rack maintenance positions. The evidence is to the contrary.

Tommy Hardy: Contrary to the majority's recitation of the facts, Tommy Hardy did not have "limited" welding experience. To the contrary, Hardy testified that he ran a body shop in which he welded auto parts. He started the body shop in 1975 or 1976, and it was still in operation at the time of trial. Hardy's welding experience was therefore very extensive. Hardy averred that the type of welding done at D & L was the same type of welding which he performed in his body shop. His work in his body shop also revealed that he had mechanical ability. Hardy testified that he informed Lamar Hays and Terry Lamb, supervisors in the maintenance shop, of his interest in temporary upgrades numerous times.

Daniel Anderson: Anderson testified that he had limited welding experience. However, he asserted that he had substantial mechanical ability. He had taken mechanics classes throughout his four years in high school and had weekly repaired his or other employees' machines when D & L's maintenance personnel were unavailable. Wallace Bailey testified that he would be interested in a production worker who could take apart machines, as Anderson could.

Alfred Kemp, Sr.: Wallace Bailey testified during trial that Alfred Kemp, Sr., had an excellent background in maintenance. In fact, prior to James Grizzard's arrival

at the plant, Kemp received both rack and general maintenance upgrades. The district court found that Howard Watson blocked every temporary upgrade which Kemp could have received during the years in question. That finding is unsupported by the record. While Watson testified that he would prohibit Kemp from receiving temporary upgrades if Kemp were needed for his general factory work, Watson conceded that he did not know whether he had blocked any such upgrades during the years in question. Wallace Bailey asserted that he knew of no reason why Kemp was not given a single upgrade from August 1982 to August 1985.

Arthur Perry: According to Wallace Bailey, Arthur Perry was qualified for general maintenance work. However, Bailey could not state a reason why Perry had not been given upgrades prior to the filing of this lawsuit.

2. Statistical Analysis

Neither a rocket scientist nor a statistician is needed to explain that absent some other explanation—which the company did not give—D & L's temporary upgrades reveal grave racial disparities. The majority correctly sets forth the temporary upgrade information in footnote 36. Were the temporary upgrade hours insubstantial, the percentages set forth by the majority in that footnote might not seem consequential. However, the number of hours involved in both the general and rack maintenance upgrades is considerable. During the Grizzard years, white employees were given 1199.4 hours of upgrades in general maintenance. Blacks received just ninety-seven.

In the rack maintenance area, Edward Otto Wolfe, a white employee, received 745 hours of upgrades during the Grizzard pre-suit period. No blacks were awarded

such an upgrade during this period. The majority places some import—import which is unsupported by the record—on the fact that Mr. Wolfe was the only person who received rack maintenance upgrades during the Grizzard era. James Grizzard testified in deposition that the maintenance department should *not* have solely awarded the upgrades to Mr. Wolfe. Likewise, Wallace Bailey asserted that he did not know why Mr. Wolfe was awarded all of the rack maintenance upgrades. The majority's supply of a reason, albeit an irrelevant and unfounded reason, is improper. *See supra* note 13.

3. Conclusion

Why whites received 1199.4 hours of general maintenance upgrades and 745 hours of rack maintenance upgrades when blacks received just ninety-seven hours of general maintenance and no hours of rack maintenance upgrades will likely never be known by this or any other court. In one of his depositions, Mr. Grizzard unequivocally refused to explicate why the company failed to provide everyone the opportunity to compete for temporary upgrades. He refused to provide an explanation even when instructed to give one by D & L's attorney.

It seems clear to me that the numbers—and the named Plaintiffs' protests—speak loudly enough for themselves in the temporary upgrade claim. Only silence comes from D & L. Therefore, this Court should reverse and remand for trial on damages.

D. Conclusion

Unfortunately for the scores of Plaintiffs involved in this suit and for the millions of minorities who once thought that America did, in fact, provide equality in employment, the district court and majority here have

ignored well-settled law, created facts, and reached conclusions in a manner which has consistently helped defendant company. In my view, both the district court's and the majority's opinions inform employers throughout this Circuit that if they engage in discriminatory employment practices and are sued therefor, the courts will explain away any disparities, as long as the employers provide sufficient smoke-filled mirrors on which the courts can rely.

In this case, D & L, unaided by the improper assistance of the courts, could not rebut the hiring, promotion, or temporary upgrade claims alleged by Plaintiffs.[31] This case should therefore be reversed.

I dissent.

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[31]There are multitudinous other errors in the district court's and majority's decisions. However, in an effort not to author a tome, this writer has focussed upon the most glaring errors.

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

DANIEL ANDERSON, JR., et al.,

Plaintiffs,

v.

DOUGLAS & LOMASON COMPANY, et al.,

Defendants.

CIVIL ACTION NO. DC 85-160-LS-O

OPINION

I. INTRODUCTION

Twenty-one individual plaintiffs brought individual and class claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and under 42 U.S.C. § 1981,[1] alleging various acts of racial discrimination in employment by the defendants. The defendant Douglas

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[1] The original complaint contained twenty-seven named plaintiffs. Over the course of this litigation, plaintiffs Andrew Christian, Thelma Hardy, Margaret Little, Jackie Sanders, and Henry Robinson withdrew their claims, see Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 1; the claims of Jarrott Tucker Lewis and Earnest Lee were severed from this proceeding, see id.; see also Order of May 23, 1989; and Ramona Rice's claims were dismissed on August 15, 1988.

& Lomason Company manufactures component parts for automobiles at its Cleveland, Mississippi, facility. During the course of the trial, the plaintiffs voluntarily dismissed the following claims:

Plaintiff Andrew Christian's allegations that he was denied a promotion because of his race; that blacks were assigned more hazardous job assignments in the buffing room of the Douglas & Lomason plant; that blacks were denied sit-down jobs as a result of a discriminatory animus; that the plaintiffs are entitled to recover damages for discriminatory hiring practices under 42 U.S.C. § 1981; and that plaintiffs are entitled to recover damages for harassment under 42 U.S.C. § 1981.

Remaining before the court are the nineteen individual claims of discrimination, as well as: (1) class claims of racial discrimination in hiring; (2) access to application forms as the result of a discriminatory animus; (3) discriminatory promotion practices; (4) discriminatory practices in temporary upgrades; (5) raciallydisparate treatment of black employees by supervisory personnel, and (6) retaliatory discharge of employees who had filed EEOC charges or whose close relatives had filed EEOC charges, ostensibly for violation of the Company's garnishment policies.

After having heard the testimony of the witnesses and the arguments of counsel, and having reviewed the exhibits submitted at trial,, the court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

HIRING CLAIMS

Plaintiffs complain of the company's hiring practic-

es during a period beginning October 1, 1982, and continuing through June, 1985. During this period of time, the Plant Manager at the Cleveland facility was James Grizzard, and the Personnel Manager was Patty Haynes.

Ms. Haynes became Personnel Coordinator on September 21, 1981, and was later promoted to Personnel Manager in March of 1982. She replaced the former Personnel Manager Ray Keeton. Ms. Haynes was placed in the position of personnel coordinator during a period of time that the company was not doing any hiring.

Prior to September 1981, when Ray Keeton was Personnel Manager, his method of taking application forms for employment was to allow employees of the company to pick up applications for friends and family members. He also allowed walk-in applicants to fill out applications 24 hours a day over three shifts, six or seven days a week. He took applications whether or not the company was hiring and kept the applications on file for one year. When hiring, he would go to his alphabetical file to attempt to find someone that he remembered, generally selecting 20-30 applications to fill 10 positions.

Mr. Keeton was not told what to look for in terms of minimum qualifications from applicants, but he had his own standard which included looking for experience and availability of transportation to work. With regard to experience, Mr. Keeton would look for previous employment as a press operator, machine operator, welder, or related field, and he would attempt to select the applicant with the most experience.

At the time of trial, Mr. Keeton was employed at the Duo-Fast Corporation as Personnel Manager. Although he had no information as to the racial composi-

tion of the applicant flow at Duo-Fast, he did testify that the racial composition of the workforce at that company is approximately fifty percent black.

Douglas & Lomason did no hiring from the time that Ms. Haynes became personnel coordinator until she became Personnel Manager in March 1982. Between March and October 1, 1982, two individuals were hired (PX 5).

Once the company began hiring, Ms. Haynes made all decisions with regard to how the hiring policy and practice would work, as well as who would be hired into general factory jobs. Although she had been given training and assistance by the company's Vice President of Personnel, Ollie Cheatham, and Wilson Kell, the Personnel Manager from the Marianna, Arkansas, plant, in general personnel procedures, she was not given any instructions by these individuals as to hiring. Mr. Cheatham testified that he felt no need to give Haynes any instructions with regard to hiring, since, by the time the Cleveland plant began hiring, she had been in the position for more than a year and from his point of observation, was handling the job capably.

The Company's Hiring Practices Under Haynes

Ms. Haynes made several changes in the company's hiring practices after she became Personnel Manager. At first, she continued to follow the practice of allowing employees of the company to procure applications for friends and family members, but she soon stopped this practice when she became concerned that many of the applications which were taken away by employees were not returned and that the individuals who were applying may not have personally filled out the application or may not really have been interested in a position. Therefore,

she required anyone who was interested in applying to come to the plant.

The next change in the hiring practices was a one-time experiment when Ms. Haynes set aside a Saturday morning, February 5, 1983, to give out application forms to individuals interested in applying. To get the word out that this procedure was going to be used, she posted a notice inside the plant to allow employees to notify relatives and friends. Ms. Haynes considered this method of receiving applications to be less than satisfactory for some of the same reasons that she changed the practice of giving applications out to employees, i.e., that many of the applications which she distributed were never returned, and because they were taken away from the plant, she did not know that the individual whose name appeared on the application form had actually filled it out.

The practice of allowing applications to be filed at any time, including when the company was not hiring, was also discontinued by Ms. Haynes. In addition, she would limit the number of applications taken to whatever she considered sufficient to fill her needs during any particular hiring period. She offered, as an example, taking 12-15 applications to fill seven positions. Ms. Haynes settled on this practice because it allowed her to know that the individuals applying were then interested in employment and available for work, and it gave her the opportunity to ensure that the individual indeed had filled out the application form. When accepting applications pursuant to this practice, Ms. Haynes allowed individuals to make an appointment to fill out applications if they called when the company was hiring and if the company had not reached the number of applications she considered sufficient to fill the company's needs. She would also accept walk-in applicants during this period until she reached her projected number of required applicants. If

an individual telephoned or came by the plant during the period of time that the company was in fact hiring, but after the point that Ms. Haynes had taken what she considered a sufficient number of applications and/or after she had made a sufficient number of appointments for individuals to apply, the inquiring individual would be told either that the company was no longer hiring or was no longer taking applications.

If Ms. Haynes were hiring a large number of individuals, she would still do the hiring in small "batches" to make it easier for her to conduct orientation for the new employees, make it easier to coordinate new employees taking their physicals, and thus not overburden any of the supervisors with an unwieldy number of new employees.

The company constructed a security fence, gate and guard house in response to vandalism and other problems in the employee parking areas, such as drug and alcohol use. Ms. Haynes instructed the security guards who manned the gate to allow individuals to enter to fill out applications only during the period of time she was hiring. She would also provide the gate guards with a list of names of individuals who had called for appointments during a period of time the company was hiring, and instructed the guards that they were to allow these individuals admittance when they came to fill out their applications. Thus, as in the period of time prior to the construction of the security gate, an individual who arrived at the gate during a period of time the company was hiring, but after a period of time the personnel manager had determined that she had a sufficient number of applications and/or appointments, would be told by the gate guard that the company was either no longer hiring or no longer taking applications.

During periods of time that the company was not hiring, individuals would still visit the plant or telephone to find out if the company was hiring, and such individuals would be told by the company, either through the personnel office or the security guard, that the company was not hiring or not taking applications. Thus, it was possible for an individual to be given the same information, i.e., that the company was not hiring or not taking applications, during periods of time when the company was hiring and similarly during periods of time when the company was not hiring.

After January of 1985, the company began to use the Mississippi State Employment Service, Cleveland Office, as its source of applicants for employment. To inform interested individuals of this new practice, a sign was posted on the security gate informing individuals that they needed to go to the employment service office to fill out applications for employment at Douglas & Lomason. Anyone who called on the telephone would be given the same information and individuals who inquired of the security guard as to whether the company was hiring or taking applications would also be given the same information. The move to the use of the Mississippi State Employment Service was done to allow the company to participate in the financial benefits of the state's on-the-job training program (OJT). Under this program, when the company needed to hire additional employees, it would file a job order with the Employment Service, which then would refer the company regular and OJT applicants. Ms. Haynes then would go to the Employment Service office to interview those referred and make her selections on separate job orders for OJT and regular applicants. For those individuals hired under the OJT program, the company would be reimbursed by the state for a portion of the wages paid to that employee while he was in training.

Although Ms. Haynes made the decisions with regard to hiring general factory workers, her decision-making authority did not include determinations of when to hire or how many employees to hire. She was given her instruction as to when and how many to hire by the Plant Manager, Mr. Grizzard.

The actual process of deciding that the company needed to hire more workers would be initiated within the various departments of the plant at the foreman and supervisory level. These individuals would discuss their manpower needs with their department heads in departmental meetings. This information was then relayed by the department heads to the production managers who would discuss it with Mr. Grizzard and other company managers in a weekly management meeting. Although the plant manager had the authority not to accept the recommendations of his managers, supervisors, and foremen, there was never a time that Mr. Grizzard decided against the recommendations of his managers as to manpower needs, except that the number he might agree to hire could be different from the number recommended to him.

The fact that the company was about to hire was common knowledge within the Douglas & Lomason workforce, among general factory workers as well as foremen, supervisors, and managers. This information was usually so widespread within the workforce and thence into the community that there were times when individuals in the community would learn that the company was hiring before Ms. Haynes was informed of this fact. A clear indication of this phenomenon is what happened to Plaintiff Chris Harris who, along with other interested blacks, was waiting for Ms. Haynes when she arrived at work one day before Ms. Haynes found out that she was hiring. She thus informed them that the company

was not hiring, after which time she learned differently from Mr. Grizzard. As a result, Ms. Harris and the other individual who accompanied her to the plant that morning were able to call later that morning and were given appointments to come in and fill out applications.

Once an individual had been allowed to come in to fill out an application, Ms. Haynes' normal routine was to have a brief interview with the individual before he filled out the application, after which the applicant would go to the employee lunch room, which is just outside the personnel office, where the application would be completed and where Ms. Haynes could monitor the fact that the individual was completing his own application. Once the application was completed, Ms. Haynes would have a second interview with the individual to make sure that the application was complete and to ask questions of the applicant as to entries made on the application. Ms. Haynes would then check references and after reviewing other applications, if that applicant were to be hired, he would be called to return to the company to take a physical.

When Ms. Haynes was hiring, she would try to schedule applicants during the morning hours so that she could complete her hiring needs for that day to allow new employees to get their physicals done before 11:00 a.m. which was the latest time she could schedule physicals. This would also allow her the opportunity to conduct her orientation of new hires and have them ready to report to work at the start of the second shift. She would then use her afternoons to review applications for the next day's hiring needs.

When Ms. Haynes was hiring, her general practice was to consider applications only for the period for which she was immediately hiring. Thus, an individual applying

during a period where Ms. Haynes was filling thirty positions over an extended period would not be considered during any subsequent period of hiring, if he had not been hired during the first period.

The exception to this general practice of not hiring individuals outside of the batches in which they were originally considered occurred when Mr. Grizzard would instruct Ms. Haynes that he wanted the employment level at the company kept at existing levels. In this situation, Ms. Haynes would replace departing employees on a one-for-one basis instead of having to hire larger numbers of employees. Whenever this occurred, Ms. Haynes would go to applications of individuals who had not been hired and select an individual whose application was still on file pursuant to the company's application retention policy. In so doing, during the period April 1984 to January 1985, this occurred twenty-four times, with 67 percent of the individuals hired under this exception to the norm being black.

Under Ms. Haynes' tenure, the company practice was to retain applications for a period of six months, after which time the applications would be discarded. Although there is some confusion in the testimony on this point, the court believes Ms. Haynes' testimony that applications were retained only for a period of six months and so finds. In so doing, the court finds no basis for the implied allegation of the plaintiffs that the defendant destroyed evidence in the form of employment applications. What makes plaintiffs' position even less persuasive is the fact that the applications of unhired individuals which remain are consistent with the testimony of Ms. Haynes, in that the date of the earliest applications of those retained correspond with the period six months before the filing of EEOC charges and continue to and through the period of time under consideration in this

case.

Moreover, it is clear to the court that if the defendant had been engaged in destruction of documentary evidence, it would not have been so selective in destroying evidence of earlier periods while it retained applications for the October, 1984, period and beyond, which are the least supportive to the defendant's case.

For the period October 1, 1982, through December 31, 1985, the company hired 483 employees, of whom 225, or 45.5 percent, were black.

The Statistical Analysis

While both parties presented expert testimony as to the significance of statistics with regard to the company's hiring practices, the court finds the testimony of the defendant's expert, Dr. Joan Haworth, both on an analysis-by-analysis basis and cumulatively, to be the more credible and more persuasive.

The plaintiff's expert, Dr. Marc Bendick, after admitting that applicant flow is the most appropriate standard, focused his testimony on a standard deviation analysis of the defendant's hiring practices, comparing the company's hiring to external "standards of availability," which are, at best, misleading.

At the same time, the presentation of the defendant's expert, Dr. Joan Haworth, was based upon a comparison of the company's actual hiring practices to the company's applicant flow for the period for which applications were retained.

An analysis of defendant's performance during

various hiring periods, as shown on Defendant's Exhibits 123 and 125, reveals there were no periods during which the percentage of blacks actually hired by the company differed by more than two standard deviations from the predicted hires. The court accepts this analysis particularly because of its use of hiring pools rather than the entire period known as the "Grizzard years" or the annualized periods within the Grizzard year. However, even when comparing these availability figures with the annual periods during the Grizzard years, only one year under each analysis, the year 1984, exceeds two standard deviations beyond the expected number. (See DX 124, and 126.)

The defendant's analysis of application pools in Defendant's Exhibits 123 and 125, as opposed to the hiring pools, analyzes the defendant's hiring practices directly with regard to the applicant flow for the period being reviewed, April 7, 1984, through January 15, 1985. This analysis indicates that given six application pools during this period, only one, the period 10/8/84 to 11/2/84, results in a standard deviation beyond two. (DX 119). With regard to this period, the testimony of Dr. Joan Haworth emphasized that this particular application pool differed from all the others in that the percentage of white applicants with related experience was much higher in that pool than in the others, and that this could account for the aberrational result for that time period. The court notes also that it was during this period of time that the activity spearheaded by Oliver Robinson to enlist other black residents of the community to sign and file EEOC charges was well underway, and may very well have had an impact upon the variance and percentage of black applicants in that applicant pool, as compared with pools before and after it.

With regard to hiring through the Mississippi State

Employment Service, in May, July, and September of 1985, Defendant's Exhibit 122A establishes that when the defendant's hiring practices with regard to the separate groups of OJT and regular hires are analyzed, there is only one job order in which the expected number of blacks hired from that job order exceeds two standard deviations. Unlike the plaintiffs' analysis of the company's hirings of MSES, the defendant's job order by job order analysis is more persuasive as it reflects the actual occurrences, whereas the plaintiffs' analysis would have the court group the job orders into one set of statistics.

The defendant's workforce during all periods of time in dispute in this case remained at a level above 70 percent black, as reflected in Defendant's Exhibit 118, which is a percentage much higher than any of the similar type indicators within the United States Census of Population for Bolivar County, such as blue-collar workforce, manufacturing workforce, civilian labor workforce, and employed civilian labor workforce, all of which are standards which represent employed persons just as the workforce figure for Douglas & Lomason does. (See also DX 139, 140, 141 and 142).

Defendant's Exhibit 138 presents an analysis of the company's history of separations during the years under consideration in this case, and clearly establishes that during the period of time that Mr. Grizzard was Plant Manager, the number of black employees who left the company was significantly lower than would have been predicted under a neutral analysis, and indeed significantly less than would have been predicted in a racially-discriminatory environment such as is alleged by the plaintiffs.

The plaintiffs' first (No. 1) standard of availability (57.5%) is a comparison of the hiring practices of the

company over the "Grizzard years" with a single month during that period which represents the single month during that period where the percentage of black applicants was highest. Such an analysis is exactly what the plaintiffs' other expert, Dr. Mann, alluded to when he testified as to the selective sampling technique, called a "chunk," which he defined as choosing "simply some portion of the universe that happens to be handy." Thus, the court gives no more credibility to this analysis by the plaintiffs than it would have given to an analysis by the defendant, based upon a single month in which the percentage of blacks was the least. Moreover, defendant's expert witness testified convincingly that the applicants during this period were not typical of other hiring periods, and the company was subjected to inordinate attention from the black community during this period of the charge filings.

The plaintiffs' second standard of availability (65.6%) compares the hiring during the Grizzard years to the proportion of blacks among individuals referred to the company by the Mississippi State Employment Service for 1985. This particular analysis suffers much the same problem as that in standard No. 1 in that it seeks to compare an entire three to four year hiring period with an extremely small sample, and in this case, a sample outside the period to which it is compared. Moreover, since the company was not using the Employment Service during the Grizzard years, prior to March 1985, this analysis attempts to compare two distinct sets of hiring practices. As the court has indicated in previous rulings in this case, the percentage of blacks referred through the Mississippi State Employment Service is suspect as a barometer of the availability of black applicants within the Bolivar County area because of its over-utilization by blacks. In this regard, the court takes note of the fact that the percentage of blacks in the civilian labor force is but 51.8

percent, a figure some fourteen percentage points less than the MSES figure.

Plaintiffs' Standard No. 3 (65.0%), which uses a subset of the individuals fully registered with the Mississippi State Employment Service, suffers the same flaws as Standard No. 2, in that it compares the Douglas & Lomason hiring practices with the Mississippi State Employment Service figure during a period of time in which the company was not using the Mississippi State Employment Service, and it compares the company with an outside source which is heavily weighted in favor of blacks because of their over-utilization of the Service.

Plaintiffs' Standard No. 4 (68.7%), again using referrals to Color-Tile, a different employer, from the Mississippi State Employment Service is suspect for the same reasons previously stated.

Plaintiffs' Standard No. 5, which seeks to compare Douglas & Lomason's hiring during the Grizzard years with the 1979 84.8 percent applicant flow at Travenol Laboratories located across the street from the Cleveland Douglas & Lomason Plant, is patently flawed. Without more, it is obvious that such a figure, which is so far removed from the availability of blacks in the Bolivar County community civilian labor force (or any other standard), has to be totally unreliable. What makes that figure even more incredible, however, and what makes the entirety of the plaintiffs' statistical presentation suspect, is the personnel manager at Travenol testified on direct examination by plaintiffs' counsel that because of a lawsuit then pending against that company, it openly and vigorously solicited higher numbers of black applicants by sending letters to ministers and other community leaders in the Bolivar County area, among other things, encouraging these individuals to have their congregations and/or

constituents come to apply for work at Travenol. In addition, there are other indicators that the process used by Travenol was completely foreign to the process utilized at Douglas & Lomason, and the comparison of the two companies' hiring practices is totally improper.

Plaintiffs' Standard No. 6 compares the hiring percentage in the general factory category at the company in the 4-3/4 years prior to Mr. Grizzard's arrival (64.6%) with the hiring percentage during the Grizzard years. While the plaintiffs have made no claims against the company for the period of time prior to Mr. Grizzard's arrival and have declared that there was no discrimination against blacks in hiring prior to Mr. Grizzard's arrival, this mere concession by the plaintiffs does not transpose itself into the conclusion that the company was bound to continue to hire at the rate of 64.6 percent in perpetuity. Plaintiffs' analysis in this case fails to take into account the distinct possibility that the hiring rate prior to the period beginning October, 1982, may indeed have been discriminatory in favor of black applicants. Plaintiffs' analysis also fails to take into account that the hiring during the pre-Grizzard period fluctuated during the more than four years that the plaintiffs relied upon, including one year in which the percentage of blacks was less than 50 percent. Finally, plaintiffs' analysis in this instance fails to take into consideration the difference in the practices and procedures initiated by Ms. Haynes which were in effect during the Grizzard years and differed substantially from what was done by her predecessor. Thus, even if the hiring practices of the company prior to October, 1982, were not discriminatory against any group, for the company's hiring percentage during that period to be utilized as a standard for later periods of time, the plaintiffs would have to show that the company's practices and procedures throughout both periods were identical and that the only change was a change in personnel. This

the plaintiffs have not and could not have shown.

Plaintiffs' Standard No. 7 compares the company's hiring practices during the Grizzard years with a proportion of blacks among persons in Bolivar County employed as operators, fabricators, and laborers in factories other than Douglas & Lomason. Like all other stock figures which are based upon a snapshot "employed" percentage, this standard is unreliable. While clearly relevant to the issue of the composition of the Douglas & Lomason workforce, it bears no relevance to the hiring practices of the company, especially where, as is in this case, there exists reliable applicant flow data. Even if it were necessary to look to external standards, however, the court would not find this standard acceptable since, based upon the plaintiffs' own presentation of the evidence in Plaintiffs' Exhibit 152, while an individual may be classified as an operator, fabricator, or laborer in a factory after being hired by Douglas & Lomason, individuals who in fact apply for jobs at the company come from a variety of fields such as waiters and waitresses, dishwashers, cooks, janitors, farmers, and counter attendants. Indeed, Plaintiffs' Exhibit 152 demonstrates clearly that in the absence of applicant flow, a more appropriate external source (if one were to look to an external source) would be a stock such as the employed civilian labor force which encompasses employed persons in all of the categories of employment such as shown under the work experience column on Plaintiffs' Exhibit 152.

For the same reasons that Plaintiffs' Standard No. 7 is unreliable, any reliance upon blue-collar workforce or manufacturing workforce stock figures, except for purposes of comparison with the employed Douglas & Lomason workforce at any point in time, is misplaced. Referring again to Plaintiffs' Exhibit 152, it is clear that the source of applicants at this company is not that group of em-

ployed persons in the blue-collar workforce or the manufacturing workforce but, instead, a much more diverse group of persons relative to their employment backgrounds who cannot readily be isolated within any one census category.

Individual Hiring Claims

Poitier Anderson claims that he was not given an application for employment and was not hired by the company because of his race from September or October of 1984 through January of 1985. (Pre-Trial Order, B 2). Anderson's attempts to get an application form were limited to his going to the Douglas & Lomason plant on several occasions and, with one exception, being unable to get beyond the security guard, and his telephoning the plant to find out if the company was hiring. He was consistently told that the company was not hiring or that it was not taking applications. In all his attempts to get an application form, Anderson never saw a white person being admitted on the premises to get a form, nor did he see a white person being given an application form.

Anderson's failure to get beyond the security guard and his failure to get an application form are in direct conflict with the facts surrounding other named plaintiffs and other black persons, such as Chris Harris and his brother, Derek Anderson, who, following the procedures which the company established, were able to get application forms and/or to be hired by the company. There is nothing in the record evidence to distinguish Poitier Anderson from other such black persons.

The calendar maintained by Mr. Anderson's mother is evidence of nothing more than a record of what Mr. Anderson may have told his mother. She did not accompany him and is not competent to testify as to

whether in fact he made visits on the times she recorded. If anything, the calendar is consistent with the concerted efforts within the black community during this period of time to make the company the focus of discriminatory charges being distributed by Oliver Robinson and to create documentation for use in the EEOC investigation and later legal proceedings. (JX 3).

The court finds the testimony of Anderson somewhat incredible. On one of his visits to the plant, Anderson says he was told by a security guard that the company was not giving applications to blacks. Anderson filed two separate charges with the EEOC after this statement allegedly was made and filled out an EEOC investigative questionnaire. At no time in any of these documents did he allege that such a statement made was made. The testimony of all of plaintiffs' other witnesses was that no similar statement was ever made to them and that they were always treated courteously.

It is noted that at least four of Anderson's relatives have been employed by the company, two of whom were hired during the Grizzard years.

Linda Sharp Davis claims that she was not given an application for employment and was not hired by the company from June, 1984, through January, 1985, because of her race. (Pre-Trial Order, B 6). Ms. Davis' attempts to apply at Douglas & Lomason were in June of 1984 and February of 1985. On each occasion she went to the company's security gate to try to get an application for employment, she was not allowed to enter the company's premises and was told by a security guard either that the company was not hiring or was not taking applications.

Her other attempts to apply for work were in the form of telephone calls between the period of June, 1984,

and February, 1985. Whenever Ms. Davis called to see if the company was hiring, she was either told that the company was not hiring or that it was not taking applications.

At no time in her conversations with the company's security guard was anything derogatory or racially oriented said to Ms. Davis, and at no time did she see any white person being given an application form for employment or being admitted to the company premises to fill out an application form at times when she was denied entrance or denied an application form.

While Ms. Davis claims to have known others who attempted to apply for work at Douglas & Lomason but who were not hired, the entirety of her testimony with regard to these other attempts by black individuals is pure hearsay.

Linda Davis' claims of not being able to get an application form for employment are inconsistent with the testimony of her sister Bobbie Sharp, who was able to get an application for employment, although she was not hired; with the testimony of Chris Harris, another plaintiff in the case, and with that of Thelma Hardy, another plaintiff, both of whom were able to get applications for employment although they were not hired. Linda Davis' testimony is also inconsistent with the testimony and evidence of other blacks who were able to get applications for employment and who were hired during the same period of time that Ms. Sharp claims she was trying to get an application form.

It is noted that at least six of Linda Davis' relatives have worked at Douglas & Lomason Company.

Linda Davis has offered no evidence as to why she

was or should be distinguishable from any other person who attempted to apply for work at Douglas & Lomason Company to the extent that there was something distinctive about the company's consideration or failure to consider her for employment while at the same time her sister and co-plaintiff, Bobbie Sharp, and co-plaintiffs, Thelma Hardy and Chris Harris, were allowed to apply for work. Nor has she shown any distinction between herself and the other black persons who were hired by the company during this period of time.

Plaintiff Chris Harris claims that she was not hired by the company based on her October 29, 1984, application because of her race (Pre-Trial Order, B 10). Ms. Harris learned that the company was hiring and/or taking applications on October 29, 1984, from black persons who had relatives working at the Douglas & Lomason plant. In response to this information, she went to the Douglas & Lomason plant at the beginning of the work shift with two other black persons from whom she had heard the company was hiring. When Ms. Harris arrived along with these other individuals at the company personnel office, she was able to get into the personnel office where she waited for the arrival of Personnel Manager Patty Haynes. Upon Ms. Haynes' arrival, Harris and the others asked Ms. Haynes if the company was hiring, to which Ms. Haynes responded "no" at which point Ms. Harris and the others left the company premises. Later that same morning, Ms. Harris learned that the company was indeed taking telephone appointments for individuals who wanted to apply for work, at which point she telephoned the plant and was given a time to come in to apply. She then went to the company, filled out an application, and interviewed with Ms. Haynes. (JX 11, Par. 5,6).

Although Ms. Harris was not hired by the company, the evidence is undisputed that the company was

hiring for jobs on the second shift at the time Ms. Harris applied. Her application clearly indicates that at the time she applied, she was enrolled as a student in afternoon and evening classes at the local junior college. As such, it is reasonable to conclude that the personnel manager would have taken into consideration Ms. Harris' unavailability for work on the second shift because of her commitment to school. Although the personnel manager's testimony which offered reasons for Ms. Harris' rejection is not absolute, there is no evidence to suggest that the proffered reason fails where there is no record evidence which demonstrates that Ms. Harris was somehow singled out because of her race to be the victim of intentional discrimination. In this regard, the court notes that other black applicants were hired on and after October 29, 1984, including individuals with whom Ms. Harris was familiar.[2]

As Defendant's Exhibits 123 and 125 demonstrate in the hiring pools beginning 10/30/84 and continuing through January of 1985, the company hired within a recognizable neutral range for those time periods. The court notes, however, that with reference to Defendant's Exhibit 121, the date of Ms. Harris' application falls within the application pools for the period 10/8/84 to 11/2/84, where the level of significance suggests other than a neu-tral [sic] selection process. However, Harris' application date falls on the tail end of that group, after which nine black applicants and twelve whites were hired, none of whom were enrolled in evening classes. An

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[2] On October 30, the company hired black applicants Albert Cox (5797), Ella Smith (5801), Kenneth Walker (5802), and Beatrice Watson (5803). The next day, October 31, 1984, black applicants Leola Crockam (5805), Glen Scurlark (5811), and Laura Weedley (5812) were hired. On November 1, 1984, black applicant Beverly Shelly (5816) was hired.

examination of the applications of the individuals hired in this group supports the contention that the whites were superior to blacks in terms of their work experience. Of the whites hired with application dates of 10/29/84, Peggy Dean (5798) had worked at Baxter's, Regina Myers (5800) had seven (7) years factory experience, and Tommy Wells (5804) had experience as a welder, welder supervisor, and maintenance supervisor. (PX 4, p. 2). Even beyond the relevance of the evidence with regard to Ms. Harris' experience at the company to her individual claim and to the class-claims, the anecdotal evidence with regard to Ms. Harris directly corroborates the testimony of the company's personnel manager and other company officials that the company's hiring process was indeed to take applications through a variety of means, including asking applicants to come in for appointments. As the testimony of Ms. Harris demonstrates, she and other black applicants were able to procure applications through this process without regard to their race. This testimony, as noted earlier, conflicts with and belies the claims of the other named plaintiffs in the case, such as Poitier Anderson, who claim to have been unable to procure applications from the company through any means.

Ms. Harris' experience also corroborates the testimony of the company officials that there were times that the community around the plant knew when the company was hiring before the personnel manager found out, which contradicts the claim of the plaintiffs that access to information as to when the company was hiring may have been restricted. Clearly, black access to information about when the company was hiring was no less than that of whites. As Ms. Harris testified in this instance, she and two other black persons with whom she went to the company were the only individuals in the office seeking applications at the beginning of the shift on the day she was allowed to fill out her application, i.e.,

there were no whites, and their information about the fact that the company was hiring came from a black employee who was not a member of the management group which made decisions about hiring.

Plaintiff Lonnie Jennings claims that he was not given an application form and was not hired because of his race from July or August, 1984, through January, 1985. James Henry Lewis claims that he was not given an application form and was not hired because of his race from July or November, 1984, through January, 1985 (Pre-Trial Order, B 12 and 13).

The claims of Jennings and Lewis are similar in that each of them visited the plant to try and get an application for employment; each of them was able to get into the personnel office and was not stopped by the security guard; each was told that the company was not hiring or was not giving out application forms; and each relied upon information from individuals employed at the company that the company was, in fact, hiring during the periods of time that they tried to get application forms. (JX 13 and 14).

While the record reflects that the company was hiring during the periods of time that these individuals claim to have sought application forms, there is no evidence that either Jennings or Lewis was singled out because of their race or for any other reason by the defendant, while at the same time the company was giving applications to and hiring other blacks. The testimony of Jennings and Lewis conflicts with that of other named plaintiffs who have testified that they were able to get application forms during the same periods of time that Lewis and Jennings claimed that application forms were denied them. Their testimony conflicts with the fact of the company's hiring of blacks during the periods of time

in which they sought application forms. Indeed, Jennings and Lewis' testimony that they were able to get in to get application forms is in direct conflict with the testimony and claims of plaintiffs such as Poitier Anderson, who alleged discrimination based upon their not being able to get beyond the security guard. Notably, both Jennings and Lewis were equally unsuccessful in obtaining application forms or being hired by the company prior to October, 1982, although each indicates that he made an attempt, or indeed several attempts, to get a job at the company prior to October, 1982.

While Jennings is not certain whether his visits to the plant were July or August and September or October, this is critical to his case since in July, August, and September there were more unhired white applicants than there were black applicants. In August all the black applicants were hired. Thus, there clearly could have been no intent by the company to discriminate against Jennings on the basis of his race. The same holds true for Lewis. In addition, when one looks to the October and November, 1984, period, only nine applications were taken in November and on only three dates, November 1, 2, 22. Only three persons were hired from November applications, one white and two blacks.

From all the evidence, it is clear to the court that while these individuals may have visited the company to seek applications, none of what they encountered and none of the surrounding facts and circumstances regarding the company's hiring during that period lead to the conclusion that these two individuals were selected out from all others during that period as targets for discrimination.

Plaintiff Michael O'Neal claims that he was not given an application form, was not hired, and was not rehired from his previous employment for the company

because of his race, from October 1, 1982, through January, 1985. (Pre-Trial Order, B 15). Plaintiff Gregory Townsend claims that he was not given an application form, was not hired, and was not rehired from his previous period of employment with the company because of his race from October 1, 1982, through January 1985. (Pre-Trial Order, B 20).

Neither O'Neal nor Townsend was entitled to be recalled by the company under the terms of the Collective Bargaining Agreement, and there is no evidence that, in terms of their being rehired, the company rehired whites and did not rehire blacks or rehired whites in a disproportionate number relative to black rehires. Indeed, the record supports the opposite conclusion. Blacks were favored as rehires, with twenty-two blacks having been rehired during the Grizzard years and only fourteen whites having been rehired. The employees who were rehired during this period were the following:

Clock	Name	Date of Application	Date of Hire	Race
5301	Benny Haynes	00/00/00	10/05/82	W
5422	Aaron Thomas	10/02/82	10/05/82	B
5304	Alfred Kemp, Jr.	10/01/82	11/07/82	B
5425	Johnny Harris	10/06/82	10/07/82	B
4998	Glenda Faye White	10/04/82	10/20/82	W

5042	Jerry Sellers	10/02/82	10/20/82	W
5349	Robert Richardson	10/03/82	10/20/82	B
5392	Pam Sutton	10/01/82	10/20/82	B
5417	Yvonne Hodges James	10/02/82	10/20/82	B
5419	Linda Parris	10/04/82	11/10/82	B
5423	L. C. Thomas	10/02/82	11/10/82	B
5483	Glen Gilbert	00/00/00	01/05/83	W
5536	Milton Griffin	02/05/83	02/07/83	W
5546	Mary Murray	02/07/83	02/07/83	W
5550	Calvin Russell	00/00/00	02/08/83	B
5551	Antonio Slaughter	02/05/83	02/08/83	B
5558	Milton Lusby	01/05/83	02/15/83	B
5575	Robert McKnight	00/00/00	02/28/83	B
5576	Cleathel Walker	10/02/82	02/28/83	B
5582	Denise Cox	10/02/82	03/28/83	B
5597	Flora Hunter	10/02/82	04/18/83	B
5619	James Winters	05/06/83	05/09/83	W

5620	K. T. Chase	05/05/83	05/13/83	B
5626	Derek Anderson	00/00/00	02/21/84	B
5634	Anthony Porter	00/00/00	02/21/84	W
5635	Jimmie Burnett	00/00/00	02/21/84	B
5636	Dorothy Kitchens	00/00/00	02/23/84	W
5639	Roosevelt Green	00/00/00	02/23/84	B
5642	Larry James	00/00/00	02/23/84	B
5645	Richard McIntyre	00/00/00	02/24/84	W
5647	Linda Pate	00/00/00	02/24/84	W
5648	Troy Snider	00/00/00	02/27/84	W
5663	James Jones	04/12/84	04/12/84	W
5670	Verlie Booth	00/00/00	05/14/84	B
5695	Gerald Benedetti	06/13/84	06/19/84	W
5797	Albert Cox	10/29/84	10/30/84	B

(PX 1-5).

Neither of these plaintiffs has offered any evidence that would distinguish his individual circumstances from that of the twenty-two other black rehires, twenty-one of whom were hired before the filing of the EEOC charges in October, 1984.

Neither of these individuals identified any occasion where he saw a white person being admitted by a security guard when admittance was denied them. The testimony is also in conflict with that of other named plaintiffs in the case and black individuals who were hired by the company who were not only able to get past security but were able to fill out applications and in some instances were hired. Indeed, Townsend's testimony is inconsistent in that he testifies to instances where he was able to get into the plant and was not stopped by the security guard, although the information he received once he got in was of the same nature, i.e., that the company was not hiring or was not giving out applications (JX 16 and 20).

Even if Plaintiff O'Neal had been considered for rehire, the fact that he had an entry on his attendance record for the brief period of time that he was employed indicating "left early" would have been a sufficient basis for the company to have refused him rehire, despite the fact that the entry may have been an error.

Given the fact that the claims of O'Neal and Townsend are nonspecific as to dates, but instead cover the entire period of time under dispute, the court finds that the totality of the evidence indicates that the company was giving applications to blacks, hiring blacks, and rehiring former black employees, there is no countervailing evidence as to how either of these was treated in a disparate manner by the company or was singled out for discriminatory treatment by the company.

The only other named plaintiff with a claim of hiring discrimination is Bobbie Sharp, who claims that she was not hired on her mid-1983 application form, was not given an application form from early 1984 to mid-1984 through January, 1985, and was not hired because of her race from mid-1983 through January, 1985 (Pre-Trial

Order, B 17).

Ms. Sharp was allowed to go to the company's personnel office to fill out an application in mid-1983. She was also able to get into the company's office in mid-1984, whereupon she was told that no applications were available. Thus, Ms. Sharp's testimony is in conflict with that of other named plaintiffs in the case who claim to have been unable to get beyond the security guard. At the same time, Ms. Sharp offers no evidence that would distinguish her being the object of intentional discrimination, while at the same time the company was hiring other black applicants. Again referring to Defendant's Exhibit 119, 123, and 125, during the periods of time which Ms. Sharp claims to have visited the plant to apply for work at the company, blacks were being hired by the company in representative numbers. In fact, in 1983, when Ms. Sharp applied, during four of six hiring periods, more than 50 percent of the hires were black, and in the other two periods in which the hiring was limited, the hiring of black applicants was extremely close to 50 percent. (DX 123).

There is no conflict in the testimony of Ms. Sharp and the testimony of the personnel manager and other company officials, that at times when the company was in fact hiring, individuals such as Ms. Sharp were told either in person or by telephone that at the moment of their inquiry, the company was not hiring or was not taking applications, and the plaintiffs offer no evidence that contrary information was being given white individuals pursuing the same course as Ms. Sharp.

The Bishop Claimants

The remaining anecdotal evidence on the issue of hiring was provided by witnesses who were originally a

part of the companion case, Bishop v. Douglas & Lomason, which was later merged into the instant litigation. The court's assessment of these individuals' claims follows, but the sum of that evidence is merely cumulative as to the attempts of black persons in the community seeking to get applications for employment, being unable to do so, and having been told that the company was not hiring or taking applications during periods of time that the plaintiffs allege the company was, in fact, hiring. As with the testimony of the named plaintiffs in this case, this cumulative testimony from the Bishop plaintiffs suffers from the same internal and external conflicts. Thus, none of the witnesses from the Bishop case have been able to identify any white person who was treated more favorably other than those who were actually hired by the company. In so doing, these individuals would have the court ignore the fact of hiring of other blacks. This the court will not do.

There is no evidence of even an isolated nature that at any time any of the named plaintiffs in this case or in the Bishop case were denied admittance to the company premises for the purposes of applying for work or that any white person who was seeking to apply was treated preferably by a security guard. There is no evidence that at any time any of the named plaintiffs or any of the Bishop plaintiffs entered the company premises and were told by someone in the personnel office that the company was not hiring or not giving out applications and that a white person was given an application for employment under the same circumstances. There is no evidence that at the time any of the Anderson or Bishop plaintiffs were told by telephone that the company was not hiring or not taking applications that anything other than that was told to white callers. In sum, there is simply nothing in the anecdotal evidence which would establish a preference in the distribution of or access to employment applications

for whites seeking employment at Douglas & Lomason Company.

Palanda Bishop is a black female with a high-school degree who has attended one year of junior college. Prior to her attempts to apply for employment with Douglas & Lomason, Ms. Bishop had no factory experience, and in fact, had never held a job. (PX 57, Ex. 1 thereto).

Ms. Bishop initially attempted to apply for employment at Douglas & Lomason in May of 1983. Ms. Bishop did not pinpoint the date on which she attempted to apply, but rather, averred that it was sometime in May, 1983, after she had just finished the spring semester of junior college. On this occasion, she was stopped at the plant's entrance by the security guard and was informed that the company was not hiring. Ms. Bishop went to the plant because she "heard through a rumor" from a friend that Douglas & Lomason was hiring. Ms. Bishop went to the plant by herself and did not see any other individual attempting to apply at the time.

Douglas & Lomason was not hiring from April 28, 1983, until May 9, 1983. In addition, the company was not hiring from May 24, 1983, until February 21, 1984. (PX 4). The court finds that Ms. Bishop could have, in fact, attempted to apply during either the first week of May, or the last week of May, when the company was not, in fact, hiring.

Ms. Bishop attempted to apply at Douglas & Lomason in the "winter" of 1984. She did not identify the month. On this occasion, she was stopped by the security guard, who informed her the company was not hiring. Ms. Bishop went to the plant by herself, and she did not see anyone else attempting to apply at this time.

After she attempted to apply at Douglas & Lomason in 1984, Ms. Bishop filled out an application at Baxter-Travenol. Ms. Bishop was subsequently informed that Baxter-Travenol was not hiring. Ms. Bishop applied for work at Duo-Fast, but could not remember the date. She was subsequently informed that Duo-Fast was not hiring. Ms. Bishop did not file a claim or charge of discrimination against either of these companies.

Ms. Bishop also attempted to apply for work at Burger King and Wendy's. She was not hired by either of these companies. The court finds that the time period which Ms. Bishop identified as to when she attempted to apply in 1984, the winter, is an insufficient basis upon which to base a conclusion as to liability. The date on which Ms. Bishop attempted to apply in the "winter" of 1984, could, in fact, have been in January or February of 1984. The company was not, in fact, hiring during the entire months of January, 1984, and the first three weeks of February, 1984. (PX 4.)

Doris Marie Burnett is a black woman with approximately two years combined college and junior-college, who previously had worked one year in a factory as a press operator and cutter in Chicago during the period 1976 through 1977. (PX 15 8, Ex. 1 thereto.) Ms. Burnett tried to apply for a job at Douglas & Lomason within a couple of days after her sister was hired on May 17, 1983. She was not stopped by a company guard. On that occasion, she saw Ms. Haynes, who told her that the company had been hiring, but was not hiring at that time. Haynes suggested that Ms. Burnett return to the plant in a few weeks. Ms. Haynes was not rude to her at this time. (PX 158.) Ms. Burnett did not feel that she had been "mistreated" at that time.

Ms. Burnett attempted to apply for work at several

other companies, but was not hired. These businesses include: Color Tile, Duo-Fast, Baxter-Travenol, Bolivar County Hospital, Kroger, K-Mart, Ruleville Health Care Center, Food-Rite, McDonald's, Sunflower, Wendy's, Jitney Jungle, Kentucky Fried Chicken, and Alco. (PX 158.) Ms. Burnett attempted to obtain applications from Duo-Fast on other occasions as well, but was unsuccessful. Other than a back-pay claim that she filed against Baxter-Travenol, Ms. Burnett has not filed a charge of discrimination against any other employer except Douglas & Lomason.

Antonio Eugene Bryson Burtin is a black man who has several relatives who work at Douglas & Lomason, including his mother, Bobbie Bryson, as well as Robert Green, Larry Green, Douglas Green, Roberta McConnell, Henry McConnell, Mary Ann Hills, Marjorie Green and Curtis Lee Stigpen. (PX 159, Ex. 1 thereto.) Mr. Burtin attempted to apply at Douglas & Lomason sometime in the spring of 1984. He claims that he attempted to apply at this time because his mother had informed him that two white individuals had been hired. Mr. Burtin's mother could not identify to him the two white individuals who were allegedly hired. When he went to the company to try to get an application in the spring of 1984, the security guard told him the company was not taking applications, and he was not rude to him.

Mr. Burtin attempted to apply at Douglas & Lomason in 1983. However, plaintiffs have withdrawn any allegations of discriminatory hiring by Douglas & Lomason concerning this occasion.

Mr. Burtin has never applied for work at Color Tile. During the relevant time period, he attempted to apply for work at Duo-Fast, but was denied an application. He also telephoned two concrete companies,

sometime after 1982, but was informed that they were not accepting applications. He did not call either of these two companies back. He also telephoned Kimberly Clark concerning employment opportunities, and was informed that the company was not hiring. He did not attempt to fill out an application there. He also was unsuccessful in obtaining work and attempted to obtain work from Pepsi-Cola in Memphis, Cooke Convention Center in Memphis, Film Transit in Memphis, K-Mart, and Uncle Ben's.

Nathaniel Cannon is a black man who previously worked at Douglas & Lomason from October 6, 1980, through December 9, 1980, when he was laid off because of lack of work. He was not informed that he would be recalled. (PX 160.) After October 1982, Mr. Cannon attempted to find employment with the Sharkey School District as a bus driver, the Sunflower Store in Ruleville, Mississippi, and Lewis Grocer. Mr. Cannon was unable to fill out an application with Sunflower.

Mr. Cannon went back to high school in September, 1982, and graduated on May 18, 1984. He waited a few months before he began looking for a job, around October, 1984. (PX 160, Ex. 1 thereto.)

Mr. Cannon has not filed a charge of discrimination against any company other than Douglas & Lomason. He is of the opinion that an individual Is color has a bearing on whether that individual is hired at a majority of businesses in Mississippi.

There is no evidence of disparate treatment in the rehiring of Nathaniel Cannon or other black employees, except to the extent that they were favored by the company as discussed earlier in this opinion.

Patricia Joyce Cannon is a black woman with two

years of junior college who went to Douglas & Lomason to apply for a job either on Wednesday, August 29, 1984, or Wednesday, September 5, 1984. Ms. Cannon did not attempt to apply for work at Douglas & Lomason earlier in August, 1984, even though someone had informed her that the company was hiring at that time. (PX 161.) On this occasion in either August or September, 1984, Ms. Cannon was informed by the security guard that the company was not taking applications. No applications were taken by the company on those two dates. (PX 161, 191, 192.)

Ms. Cannon also attempted to apply for employment at Duo-Fast. She was given an application for employment at Duo-Fast by a supervisor she knew personally. Ms. Cannon was told by this individual that Duo-Fast was hiring at the time. Ms. Cannon has never worked for Duo-Fast.

Ms. Cannon also attempted to apply for work at Baxter-Travenol, Wendy's, and Color Tile. She was not hired by any of these companies.

Plaintiffs have asked this court not to make findings on Ms. Cannon's subsequent visit to Douglas & Lomason because she could not identify the date when this visit, in fact, occurred.

Julius A. Christian III is a black man with a high-school degree who initially attempted to apply for employment with Douglas & Lomason on February 5, 1983. On this date, Mr. Christian arrived at the plant at or around 7:30 in the morning. The security guard told him that the company was hiring and subsequently let him through. There was, according to Mr. Christian, a "fairly big" line of people already there. Mr. Christian stood in line for five hours and was unable to obtain an application form.

The court finds a reasonable explanation of this event in the testimony of Ms. Haynes that prior to 8:00 or 9:00 in the morning, all the applications that she had had been distributed. (PX 162.)

Mr. Christian also attempted to apply for a job with Douglas & Lomason in August 1984, after a Douglas & Lomason employee, Henry Harris, told him that the company was hiring. The security guard turned him away from the gate, stating that the company was not hiring. Mr. Christian did not see anyone else enter the plant through the gate at this time. In August of 1984, applications were taken on only six days and 100 percent of the black applicants that month were hired. (PX 191, 192.)

During the time period February-August, 1984, Mr. Christian did not apply or attempt to apply for work at any other businesses in the Cleveland, Mississippi, area. Mr. Christian "has no particular reason" to explain why he did not attempt to apply at Baxter- Travenol.

Eugene Brown Criss is a black man with a high-school degree. In October, 1984, Mr. Criss and Mr. Malcolm Norwood, who is also black, went to the Douglas & Lomason facility to apply for a job. When Mr. Criss and Mr. Norwood arrived at the plant, the security guard told them that the company was not accepting applications. The security guard did not speak to Mr. Criss in a rude manner. (PX 163, Ex. 1 thereto.) Mr. Criss saw one other black person being turned around from the gate when he and Mr. Norwood arrived at the plant.

Between 1982 and 1985, Mr. Criss applied for work in the Cleveland and Greenville, Mississippi, area at the following businesses: Popeye's, Duo-Fast, Shelby-Die Casting, McDonald's Restaurant, and Baxter-Travenol. Mr. Criss was not hired by any of these companies. Mr.

Criss has been to the Mississippi State Employment Service to inquire about employment opportunities "several times," but has never specifically asked to be referred to Douglas & Lomason for employment.

Willie Earl Crout is a black man who is a high-school graduate, and who has factory experience as a machine operator at Burlington Tools in Cleveland, Mississippi, in 1970. Mr. Crout attempted to obtain a job at Douglas & Lomason in late 1982. On this occasion, he spoke with Patty Haynes, who informed him that the company "wasn't doing any more hiring." (PX 164, Ex. 1 thereto.) Ms. Haynes did not speak to Mr. Crout in a hostile manner. Mr. Crout did not see any other individual filling out an application for employment at this time.

Mr. Crout and Mr. Larry Honorable, a black man, went to the Douglas & Lomason facility in February of 1984 to apply for a job. This is the only occasion in 1984 in which Mr. Crout attempted to apply for work at Douglas & Lomason. Mr. Crout and Mr. Honorable were informed by the security guard that he could not let them into the gate to put in an application without their having an appointment. Mr. Crout left without having asked the guard how to make an appointment. He did not attempt to subsequently call Ms. Haynes to get an appointment. In February 1984, five whites and four blacks were hired and only one white and one black was hired off of February applications. (PX 191, 192.)

Mr. Crout filed a claim of discrimination against the Mississippi State Employment Service on January 21, 1985. Mr. Crout has no reason, other than the fact that he obtained other employment in February, 1985, and thus was not concerned at that time, to explain why he waited until 1987 to become involved in the instant action against Douglas & Lomason concerning his allegations of

discriminatory hiring practices by the company in 1982 and 1984.

Mr. Crout attempted to apply for employment at both Duo-Fast and Color Tile in 1984. He was not hired by either of these entities.

Mr. Crout was aware that another black man, Larry James, had been hired at Douglas & Lomason in February, 1984. (PX 5.) Despite the fact that he knew that Mr. James had been hired at this time, he never attempted to apply again at Douglas & Lomason.

J.C. Evans is a black man with a 10th-grade education. (PX 165, Ex. 1 thereto.) He worked for Douglas & Lomason as a general factory worker from October 6, 1980, until he was laid off for lack of work on December 9, 1980. Mr. Evans was not a member of the union at that time, and did not have recall rights. (Stipulation of Parties, JX 24.)

Mr. Evans went to the plant to apply for a job at the same time that Mr. Bobby Jolly went to the plant to apply. Mr. Evans was behind Mr. Jolly in line. There were about ten white individuals in the line, all ahead of Mr. Evans, and one black person was in line behind Mr. Evans. Mr. Jolly's application date was May 6, 1983. The only other person hired whose application is dated May 6 was James Winters. Thus, if in fact Evans saw ten whites applying, only two of the ten were hired. (PX5.)

One individual was hired who applied on the following day, May 7, 1983, when Mr. Evans returned to the plant to obtain an application for employment. That person was Clyde Brown, who is black. (PX 192.) In August and September, 1983, Mr. Evans testified that he was informed by Plaintiff Catherine Spells and another

Douglas & Lomason employee, Reverend Robert Hampton, that the company was hiring. Plaintiffs' Exhibit #5 reveals that the company was not, in fact, hiring during this time period.

Mr. Evans attempted to apply at Douglas & Lomason in March, 1984. Nobody had told him that Douglas & Lomason was hiring. The security guard told him that the company was not hiring, and would not let him in the plant. Plaintiffs' Exhibit #5 reveals that only four individuals were hired in March of 1984, three whites and one black, all of whom were hired on either March 5 or March 6.

Mr. Evans attempted to apply for employment at Douglas & Lomason in December, 1984. During this month, five employees were hired. All the hires in December had October application dates. (PX 5, 192.)

Mr. Evans also applied for work at Duo-Fast approximately six times. He was never hired. Mr. Evans attempted to apply at Baxter-Travenol once. He never attempted to apply a second time.

Marjorie Foster is a black woman who received a high-school degree in 1970. Two years later, Ms. Foster received an Associate of Arts Degree. Plaintiffs have limited their claims concerning Ms. Foster's attempts to apply at Douglas & Lomason to one occasion, in the summer of 1984.

On the occasion in the summer of 1984 when she attempted to obtain an application, Ms. Foster does not remember if the security guard who told her the company was not hiring called the office to determine if she could get an application.

Ms. Foster also attempted to apply for work at Baxter-Travenol, Color Tile, and Duo-Fast. Ms. Foster was not hired by any of these companies.

Maggie Sue James Franklin is a black woman with a high-school GED equivalency certificate. (PX 167, Ex. 1 thereto.) Her only attempts to obtain employment with Douglas & Lomason were telephone inquiries that she made to the Douglas & Lomason facility in May, 1984, and July, 1984, and on one occasion when she went to the plant in the first week of January, 1985.

At the time that Ms. Franklin spoke with Alice Chase in May of 1984, she knew who Alice Chase was. Ms. Chase informed her that the company was not taking any more applications because it had hired enough people. Ms. Franklin's neighbor, Ms. Brenda Chase, who is black, was able to obtain an application; and was hired by Douglas & Lomason on May 30, 1984.

On the occasion when Ms. Franklin spoke with Alice Chase in July, 1984, concerning employment opportunities, Ms. Franklin is not sure whether Ms. Chase told her that the company was not taking any more applications, or that Ms. Franklin should go to the unemployment office to inquire about employment.

Ms. Franklin also attempted to obtain employment at Baxter-Travenol, Duo-Fast, a few restaurants, and some nursing homes. With the exception of Burger King and Zion Grove Nursing Home, none of these businesses offered Ms. Franklin a job.

Doris Stine Brown Hall is a black woman with an 8th-grade education and five years of factory experience prior to her 1980 hire by Douglas & Lomason. She worked for Douglas & Lomason from October 20, 1980,

to December 9, 1980, when she was laid off for lack of work. Ms. Hall understood that she did not have recall rights under the union contract. (PX 168, Ex. 1 thereto.)

Plaintiffs have selectively limited their contentions concerning Ms. Hall's efforts to apply at Douglas & Lomason for the time period on or after April 13, 1983, until May 24, 1983. During this time period, Ms. Hall limited her efforts of obtaining employment at Douglas & Lomason to telephoning the personnel office. (PX 168, Ex. 1 thereto.) On the occasions when she telephoned the personnel office, and was informed that the company was not hiring, Ms. Hall did not know the identity of the person she spoke with, but thought that she spoke with Alice Chase "at least two times." During this period thirty-two blacks and twenty-seven whites were hired. (PX 192.)

On the occasions in April, 1983, through May, 1983, when she was attempting to obtain employment with Douglas & Lomason Company, Ms. Hall was working full-time at the Cleveland Health Care Center. Subsequently, Ms. Hall downgraded this position from a full-time to a part-time job. In addition, she voluntarily quit this job for a while.

Ms. Hall did not apply for work at Color Tile because she had heard that the working conditions at Color Tile were not satisfactory. Ms. Hall did not apply at Baxter-Travenol for work because "she didn't want to work there." These circumstances cause the court to question Ms. Hall's sincerity regarding her attempts to find a factory job. Ms. Hall applied at Duo-Fast, and was not hired.

Shirley Jean McCoy Harris is a black woman with a high-school degree and two years of junior college in

which she studied elementary education. She did not receive a degree. She worked in a factory for four months in 1977. (PX 169, Ex. 1 thereto.)

Plaintiffs have limited their contentions concerning Ms. Harris' attempts to obtain a job at Douglas & Lomason to one occasion in the summer of 1984, which, according to Ms. Harris, includes only the months of June, July, and August. On the occasion when she attempted to apply for work in the summer of 1984, Ms. Harris was informed by a security guard that the company was not taking applications. Ms. Harris was by herself on this occasion, and the security guard was not rude to her. Ms. Harris was informed by an individual that the company was hiring at this time. Despite this information, Ms. Harris waited at least one month before applying at Douglas & Lomason. She stated that no one told her that Douglas & Lomason was hiring in the summer of 1984, and accordingly, she went to the plant at that time because she was "job hunting." Ms. Harris never tried to apply at Douglas & Lomason again after August, 1984.

Ms. Harris has attempted to apply for work at Duo-Fast, Color Tile, and Baxter-Travenol. She was unable to obtain an employment application from Shelby Die-Casting Company. The record is unclear as to whether Ms. Harris attempted to apply for work at any business other than Douglas & Lomason in the summer of 1984. Ms. Harris did not contact the Mississippi State Employment Service concerning employment opportunities until 1985. (PX 169, Ex. 2 thereto.)

Ms. Harris did not feel that she had been discriminated against by Douglas & Lomason until June, 1987, which was after her attempt to apply at Douglas & Lomason in the summer of 1984. In June of 1987, Ms. Harris was contacted by Ms. Traci Cook of the Lawyers

Committee for Civil Rights under Law concerning Ms. Harris' participation in this lawsuit.

Gloria Dean Green Howard is a black woman with a high school GED equivalency certificate and approximately three semesters of junior college. She has about six months of factory experience, working at Baxter-Travenol in 1979 - 1980. Ms. Howard quit this job on her own volition. (PX 171, Dep. Tr. 19.) After she quit her job at Baxter-Travenol, Ms. Howard did not work again until 1985, with the exception of a one-week-long job in 1980. (PX 171, Ex. 1 thereto.) Ms. Howard filled out an application for employment at Duo-Fast one time, after the year 1982. She never called Duo-Fast back to inquire about the status of her application. Ms. Howard did not want to work at Color Tile. Although she applied again at Baxter-Travenol, Ms. Howard was not rehired by Baxter-Travenol because she quit her job there in 1980. The court questions Ms. Howard's sincerity in wanting to work in a factory position.

Plaintiffs have limited their contentions concerning Ms. Howard's efforts to obtain employment at Douglas & Lomason to one occasion, in late July, 1984, or just before Ms. Shirley Butler, a black female, was hired on July 31, 1984. Only one white applicant and one black applicant with an application date before July 31, 1984, were not hired. On this occasion, Ms. Howard and two other individuals went to the plant and were stopped by a security guard. The security guard asked them if they had made arrangements for an appointment. The security guard was not rude or disrespectful to Ms. Howard or the other individuals in any way. (PX 171, 191, Ex. 1 thereto.)

Bettie Jean James McNeill is a black woman with a ninth grade education; she has almost nine years

experience in factory work as a punch press operator, stamping machine operator, and parts inspector for several different companies in Chicago and Michigan. Some of these factory jobs lasted less than one year. Ms. McNeill's last factory job was from April, 1978, until October, 1979. (PX 174, Ex. 1 thereto.)

Plaintiffs have limited Ms. McNeill's efforts to obtain a job with Douglas a Lomason to two occasions that occurred in the first week of January, 1985. Twelve blacks and fourteen whites were hired in January, 1985. The security guard(s) on duty at the time informed Ms. McNeill the company was not accepting applications. (PX 192.)

Ms. McNeill looked for work, but did not fill out an application for employment, at the following companies: Sears, Duo-Fast, Color Tile, Alco, Shelby Nursing Home, and Kentucky Fried Chicken. She did not apply at any of these businesses because she was told that none of them were hiring. Ms. McNeill did not file a charge of discrimination against any of these companies.

Ms. McNeill felt that she had been discriminated against by Douglas & Lomason in January of 1985, but did not file a charge of discrimination against Douglas & Lomason. She was subsequently informed by her cousin, Glenda James, that she should contact the Lawyers' Committee for Civil Rights under Law concerning possible claims of discrimination against Douglas & Lomason. She did not contact the Lawyers' Committee about any claims she might have against any of the other businesses that would not permit her to file an application. Since the end of January, 1985, Ms. McNeill has not attempted to apply at any other businesses other than Douglas & Lomason, with the exception of Baxter-Travenol. Baxter-Travenol did not contact Ms. McNeill

concerning the status of her application.

Chris Angela Jackson Mitchell is a black woman who, prior to the occasion when she attempted to apply for employment at Douglas & Lomason in the fall of 1984, had completed the tenth grade of high school. Both prior, and subsequent to, the fall of 1984, Ms. Mitchell had no factory experience. Prior to her attempt to obtain employment with Douglas & Lomason in the fall of 1984, Ms. Mitchell's last job was a part-time position in 1980 that lasted for approximately three months. (PX 175, Ex. 1 thereto.)

Plaintiffs have limited their allegations concerning Ms. Mitchell's efforts to obtain employment with Douglas & Lomason to one occasion in the fall of 1984. Ms. Mitchell and Claude Wyatt went to Douglas & Lomason in the fall of 1984 to apply for jobs. The security guard informed her that he did not have any applications and that she would have to call the personnel office concerning inquiries for employment. Ms. Mitchell also saw some white individuals attempting to obtain employment applications at this time. None of the white individuals were able to get inside the gate. She subsequently contacted Ms. Alice Chase, who informed her the company was not doing any hiring. Ms. Mitchell did not attempt to apply at the Douglas & Lomason facility after the fall of 1984.

Ms. Mitchell was unable to obtain applications for employment, on at least one occasion, from the following employers: Baxter Travenol, Duo-Fast, Shelby Die-Casting, Holiday Inn, Colonial Inn, Cato Store, Kerwin's Department Store, and Delta Motel. She has not filed a claim against any of these companies alleging racial discrimination. Ms. Mitchell lived next door to Kimroy Williams, a very active plaintiff in this lawsuit, about the time she

attempted to apply at Douglas & Lomason in the fall of 1984. Ms. Mitchell felt discriminated against at the time that she was unable to obtain an application for employment in the fall of 1984. However, she says she did not inform Mr. Williams that she had felt discriminated against. Ms. Mitchell never filed a charge of discrimination against Douglas & Lomason Company.

Daisy Mae Weatherspoon Pates is a black woman whose allegations concerning her efforts to obtain employment from Douglas & Lomason are limited to the period January, 1984, through May, 1984, and in the first half of January, 1985. Prior to January, 1984, Ms. Pates had no factory experience and had never held a full-time job. (PX 166, Ex. 1 thereto.) Ms. Pates did not begin looking for a job until 1984, because she had just had a child with whom she wanted to spend some time. She limited her job search from the period January through May of the year, because she felt this was the best time to find a job. Ms. Pates went by herself to the Douglas & Lomason plant in 1984 to look for employment. The security guard did not let her pass through the gate.

Ms. Pates went to the Douglas & Lomason plant on January 10, 1985, to inquire about employment. The security guard did not let her past the gate because her name was not on a list. Ms. Pates did not expect to get inside the plant to fill out an application for employment. She did not see anyone else enter the plant at this time. Three blacks and three whites were hired after January 10, 1985, and one black and one white with application dates after January 10, 1985, were not hired. (PX 191, 192.)

Over the next several days, Ms. Pates called the personnel office and asked if [sic] was accepting employment applications. Ms. Pates was informed by an employ-

ee with the company that the company was not accepting applications at that time. The employee did not identify himself/herself by name, and was not hostile to Ms. Pates in any manner. Ms. Pates did not leave her name or telephone number.

The court notes that at least six of Ms. Pates' relatives either currently work or have worked for Douglas & Lomason Company. During the relative time period, Ms. Pates also attempted to apply for work at Kroger, Kerwin's, Jitney Jungle, K-Mart, Pizza Hut, Duo-Fast, Color Tile, and Baxter-Travenol. Ms. Pates did not attempt to apply at Baxter-Travenol because she had not heard that the company was hiring. Ms. Pates did not file any claims or charges of discrimination against any of these employers who did not hire her during the relevant time period.

Johnny Peter Rhodes is a black man with a high-school degree. He had previously worked in a factory in Chicago in the early 1970's as a punch-press operator and die-setter. Plaintiffs have limited any allegations concerning Mr. Rhodes' efforts to obtain employment at Douglas & Lomason to one instance in early October, 1984, when he attempted to obtain an application. (PX 177, Ex. 1 thereto.) On this occasion, approximately one week before October 15, 1984, Mr. Rhodes had arranged to bring lunch to a Douglas & Lomason employee, Ms. Cora Wright, and accordingly, was able to go through the gate and into the personnel office. Ms. Alice Chase informed him that the company was not handing out applications.

In the fall of 1984, Mr. Rhodes was employed by Peacock Farms. Mr. Rhodes also attempted to apply at several places, including Duo-Fast, Color Tile, Alco, and Shelby Die-Casting. He felt that he had been discriminated against by these companies, but did not file charges or

claims of discrimination against them.

Lacy Maurice Robinson is a black man who has a high-school degree and no factory experience prior to his attempts to obtain employment with Douglas & Lomason Company in April, 1983, and thereafter. (PX 178, Ex. 1 thereto.)

Mr. Robinson telephoned the personnel office in April of 1983 to inquire about employment. He spoke with Ms. Alice Chase, who informed him that the company was not giving out applications. Mr. Robinson did not ask Ms. Chase at this time when the company would be giving out applications.

In February of 1984, Mr. Robinson attempted to apply for employment by going to the Douglas & Lomason plant. Mr. Robinson was attempting to find work at this time because he was trying to buy his wife something for her birthday and start "his own living." The security guard stopped him and told him that the company was not hiring. Mr. Robinson did not ask the security guard when the security guard thought the company would be hiring. The security guard informed Mr. Robinson that he could call the personnel office and inquire as to when the company would be hiring.

On one occasion during the time period between May or June, 1984, and October 1984, Mr. Robinson telephoned Douglas & Lomason and was told that the company was not hiring that day. The individual that Mr. Robinson spoke with informed him that he should telephone again later. In late May or June, 1984, Mr. Robinson went to the plant again to obtain an application for employment. The security guard informed him that the company was not issuing applications. Mr. Robinson went to the plant in October, 1984, and attempted to

obtain an application for employment. The security guard again informed him that the company was not hiring.

On the occasions when Mr. Robinson went to the plant, he never asked the security guard how he should proceed in getting applications. On the occasions when the security guard would not let Mr. Robinson enter the plant, Mr. Robinson never saw the guard let any other individual enter the plant.

During the time periods when he was attempting to find work at Douglas & Lomason, Mr. Robinson also attempted to find work at Duo-Fast, Sunflower, Color Tile and Baxter-Travenol. With the exception of Sunflower, none of these companies offered Mr. Robinson a job. Mr. Robinson did not put in an application at Color Tile because he had been informed that the company was not issuing applications at the time. Mr. Robinson did not file claims of discrimination against any of these companies.

Lula Mae Robinson is a black woman with a high-school degree. Prior to her attempts to obtain employment with Douglas & Lomason Company, her work history included a part-time, three-hour per week job that lasted from around November, 1979, until the latter part of 1981. In early 1982, Ms. Robinson moved to Chicago, where she lived for approximately one year, to work as a babysitter for her brother. (PX 179, Ex. 1 thereto.)

Ms. Robinson filled out applications for employment at Douglas & Lomason on two occasions in 1983. On the first occasion, Ms. Robinson had gone to the personnel office to obtain an application and was informed by a secretary that all of the applications had been distributed. On the first occasion, Ms. Robinson obtained the employment application from a Douglas & Lomason

employee, Mr. Freddie Campbell. Mr. Campbell informed Ms. Robinson that he was going to turn the application in. Subsequent to this occasion, and sometime in 1983, Ms. Robinson again went to the Douglas & Lomason Personnel Office, and was given an application for employment by an employee in the personnel office. Ms. Robinson filled out the application and handed it to the employee. Ms. Robinson's affidavit concerning her efforts to obtain employment at Douglas & Lomason Company since October 1, 1982, is totally devoid of any description of the occasions in 1983 when she filled out applications. (PX 179, Ex. 1 thereto.)

Ms. Robinson applied for a position with Shelby Die-Casting sometime around November, 1983. She was hired by Shelby Die-Casting in a part-time capacity in November, 1984.

Ms. Robinson went to the Douglas & Lomason plant to apply for employment in September of 1984. She was stopped by a security guard and was not allowed to enter the plant. The guard did not speak to her in a rude manner. Ms. Robinson did not see the guard allow anyone else to enter the plant on that occasion. Approximately one month later, in October, 1984, Ms. Robinson again attempted to apply for employment at Douglas & Lomason. On this occasion, Ms. Robinson was stopped by the security guard who asked her for her name. The guard informed Ms. Robinson that her name was not listed.

On November 1, 1984, Ms. Robinson filled out an application for employment with Douglas & Lomason. (PX 4.) Ms. Robinson obtained the application from a secretary in the personnel office. Ms. Robinson filled out her application at this time and saw another black female filling out an application as well. On this application, Ms.

Robinson failed to make any reference concerning her previous part-time employment. Only three people, two blacks and one white, were hired from November applicants. (PX 4, 192.)

Ms. Robinson never saw any white individuals being let into the plant when she attempted to apply for employment.

On the occasions when she attempted to apply at Douglas & Lomason, Ms. Robinson also attempted to apply for work at McDonald's, Parchman, Baxter-Travenol, Burger King, and Duo-Fast. She was not contacted by any of these employers concerning the status of her application. Although she was not hired by Baxter and Duo-Fast, Ms. Robinson did not feel that she had been discriminated against by either of these companies. Ms. Robinson has not filed a charge or claim of discrimination against any of these companies.

Amos Nelson Rogers is a black man with a ninth grade education, who has approximately seven months factory experience. On two occasions in the summer of 1984, Mr. Rogers accompanied Lonnie Jennings to the Douglas & Lomason plant to look for employment. (PX 180, Ex. 1 thereto.) On one of the occasions, both Messrs. Rogers and Jennings went into the personnel office and spoke with Ms. Alice Chase. Mr. Rogers knew Ms. Chase through her ex-husband. Ms. Chase told the individuals that the company was not hiring. On their second visit, Mr. Rogers and Mr. Jennings were stopped by a security guard who did not let them into the plant. At no time has Alice Chase ever told Mr. Jennings that the company was hiring.

During the relevant time period, Mr. Rogers looked for work at Lowry Tims, Layne Central, and

Simmons & Belk, but was not hired by any of these companies. Mr. Rogers did not fill out an application at either Layne Central or Simmons & Belk. Mr. Rogers never attempted to determine if these companies were, in fact, hiring. Mr. Rogers has never filed a lawsuit or claim or charge of discrimination against any employer except Douglas & Lomason.

Miller Ann Slaughter is a black female. Ms. Slaughter was by herself when she claims to have attempted to apply for employment with Douglas & Lomason in 1984. Ms. Slaughter did not see the security guard let any other person in the plant at this time to get an application. (PX 182, p. 13.) There were other individuals in front of Ms. Slaughter who were attempting to apply for work at Douglas & Lomason Company through the Mississippi State Employment Service when Ms. Slaughter attempted to apply at Douglas & Lomason through the Mississippi State Employment Service in June of 1985. On the occasions when Ms. Slaughter claims that she attempted to contact Mr. Grizzard concerning employment with Douglas & Lomason, she did not ask to speak to Patty Haynes.

Ms. Slaughter moved to Mississippi from Gary, Indiana, in 1981. (PX 182, Exhibit 1, p. 4.) The first job that Ms. Slaughter had upon her return to Mississippi was at the Burger Hop in Cleveland in 1981. Ms. Slaughter quit this job on her own. She then worked for no more than six months at Popeye's Fried Chicken in Cleveland. Ms. Slaughter did not attempt to look for work during the one and one-half year time period between the time that she left Popeye's Fried Chicken in 1982 and the time that she claims to have attempted to obtain employment at Douglas & Lomason in 1984. Since her attempts to obtain employment at Douglas & Lomason, the last being in October, 1985, Ms. Slaughter has quit two other jobs:

J&M Package Store in Cleveland, Mississippi, and Smith's Burger Shop in Cleveland, Mississippi. These circumstances lead the court to question Ms. Slaughter's sincerity in her alleged attempts to find work.

Melvin Shaw is a black male. Mr. Shaw and his cousin Willie Foust went to the Douglas & Lomason plant in October, 1982, to apply for employment and were not stopped by a security guard. On this occasion, Mr. Shaw and Mr. Foust went to the personnel office, and spoke with a female Douglas & Lomason employee, who informed them that "I am sorry, but the company is not giving out applications." (PX 181, p. 7.) Mr. Shaw identified this person as Patty Haynes.

Mr. Shaw went to the Douglas & Lomason plant again in March, 1983 with his cousin Willie Foust. On this occasion, they were not stopped by a security guard as they entered the plant. (PX 181, Ex. 1, p. 2.) Mr. Shaw was unable to obtain an application for employment from Douglas & Lomason at this time. He did not see anyone else obtain an application for employment. At the time that he attempted to obtain an application on this occasion, he did not know if the individual with whom he spoke was Patty Haynes. No one was hired by the company who had an application date in March, 1983 (PX 192). In April and May of that year, the company hired eight people from the February 5 period, all of whom were black. (PX 192.)

Mr. Shaw has worked several part-time jobs. He claims that he applied at Douglas & Lomason because "he had just graduated from school and needed work" and that he wanted a full-time job "because he had a daughter he was trying to take care of." Mr. Shaw also applied for employment at Duo-Fast. He did not apply for employment at Color Tile, which is in the same vicinity as

Douglas & Lomason and Duo-Fast, because he "just wasn't interested in Color Tile." Mr. Shaw claims that he was qualified to work at Color Tile. The court questions both Mr. Shawls sincerity and efforts in his attempts to obtain full-time work.

Nolan Williams is a black man with a high-school degree who has attended junior college, and who has a little more than eight years experience as a pipefitter and welder at two different shipyards in New Orleans. (PX 184, Ex. 1 thereto.)

Mr. Williams called the Douglas & Lomason plant sometime in October, 1984, and asked to speak to Alice Chase concerning employment opportunities. Mr. Williams telephoned the plant concerning employment opportunities because his wife had heard a rumor that the plant was hiring. Ms. Chase informed Mr. Williams that the company was not hiring. A few days later, Mr. Williams, along with another black individual, Billie Caffey, went to the plant to apply for a job. He was informed by the security guard that the company was not hiring. Mr. Williams did not see the security guard have a conversation with anybody other than himself and Mr. Caffey.

In early January, 1985, Mr. Williams returned to the Douglas & Lomason plant to apply for a job. The security guard informed him that the company was not hiring. Mr. Williams did not hear the security guard have a conversation with anyone else at this time. Mr. Williams then left the plant. In mid-January, 1985, Mr. Williams went to the plant with Mr. Billie Caffey to apply for a job. The security guard spoke with somebody on the telephone and then informed Mr. Williams the company was not hiring. Mr. Williams did not see the security guard allow anyone into the Douglas & Lomason plant at

this time or on any of the other occasions when he went to the plant to apply for work. The company only took applications on eight days in January, 1985, none after January 15.

Nolan Williams' wife, Dorothy Williams, was hired by Douglas & Lomason on August 25, 1985.

During the relevant time period, Mr. Williams attempted to apply for work at Duo-Fast, Sylvania Steel, and F&I Company. He did not apply at Ampco, because he was informed that they were not hiring. Mr. Williams did not attempt to find out about the status of his application at Sylvania Steel. Mr. Williams was subsequently hired by Duo-Fast in January of 1985.

Nr. Williams has never filed a charge of discrimination with the Equal Employment Opportunity Commission against any company, including Douglas & Lomason.

In point of fact, the cumulative testimony of the Anderson and Bishop Plaintiffs, instead of being consistent with a pattern of and practice of discrimination against blacks, is consistent with the company's adherence to its policy as described by the personnel manager -- a policy under which numerous black applicants were able to fill out applications and to be hired. Nothing in the cumulative anecdotal evidence establishes that the Anderson or Bishop plaintiffs who sought employment at the company were somehow distinguishable on the basis of their race from the other black persons who were hired by the company at the same time that the Anderson and Bishop Plaintiffs were seeking employment.

It is of particular note that the witnesses in this case all attempted to apply only at times when the company was hiring. This suggests two possibilities --

either the witnesses were prompted by the information provided by the active plaintiffs, which is often referred to in the testimony as the witnesses having seen a "list," so that their testimony could be adjusted to conform with the evidence already produced in discovery; or, the word-of-mouth recruitment practice of the company operated so efficiently that these witnesses and other individuals in the black community always knew exactly when to attempt to apply and when not to bother. The court finds that the latter prospect is not very likely.

Another interesting fact found in the cumulative testimony of the Anderson and Bishop plaintiffs is that except for the isolated instance referred to by plaintiff Poitier Anderson, there was absolutely no evidence of security guards, secretaries, or any other representative of the company having used any derogatory terms or racial epithets or anything similar in conversations with the Anderson and Bishop plaintiffs who were seeking employment at the company. Indeed, the testimony was overwhelming to the contrary. Similarly, there was no testimony as to any of those individuals having been treated in a harsh or rude manner.

The Equal Employment Opportunity Commission investigated the charges of the named plaintiffs who filed with the EEOC and determined that there was no reasonable cause to believe the allegations of race discrimination in the inability of blacks to get applications for employment or to be hired by the company. While not bound by the EEOC determinations, the court is persuaded to give those determinations substantial weight, especially in light of the anecdotal evidence presented at trial.

The court also rejects the contention that the time between application and hire is in any way relevant to the issue of the impact or intent of the company's hiring

practices or in any manner takes away from Dr. Haworth's pool analysis. Dr. Haworth's testimony clearly shows that seventy-five percent (75%) of all hiring was done within two calendar weeks of the application dates. Moreover, the evidence overwhelmingly establishes that in terms of hiring from earlier application periods, blacks were favored over whites.

Furthermore, when considered in conjunction with plaintiffs' contention that the surviving applications are incomplete, the evidence demonstrates that there is an obvious reason for the shortage of unhired applicants in periods prior to October, 1984, i.e., because applicants who would otherwise appear as unhired were hired in later periods, and since this practice was more prevalent prior to October, 1984, there would necessarily be a difference in the number of unhired applicants in the earlier period versus the later period. For this reason and upon all the evidence of record, the court finds the surviving applications to have been complete.

PROMOTIONS

Plaintiffs Moses Coleman, Richard Grant, Earnest Hall, Robert Melvin, Alexander Smith and Kimroy Williams claim that because of their race, they were not promoted to leader or foremen positions on and after October 1, 1982. Earnest Hall's claim at the time of trial ran to June 3, 1987, at which point he was promoted, and Kimroy Williams' claim ran to June 8, 1987, at which time he was promoted. The claims of the other named plaintiffs are continuous. (Pre-Trial Order, B 5, 7, 8, 14, 18, and 21.)

Statistical Analysis

At all times relevant to this period, the workforce

of the company was more than 70 percent black, with the production workforce being in the range of 80 percent black. (DX 118; PX 139). At the same time the various labor market indicators showed the civilian labor force at 51.9 percent black, the manufacturing labor force at 58.2 percent black, and the blue-collar workforce at 60.7 percent (DX 127).

At all times during the relevant period, the percentage of blacks at Douglas & Lomason Company in the leader, foreman, and supervisor categories was no less than 42 percent (DX 129). At the same time, in the outside labor market in Bolivar County, 19.1 percent of the supervisors in production-related occupations was black. (DX 127.)

Defendant's Exhibits 128, 129, 130 and 131 clearly establish that the percentage of black employees in leader, foreman, and supervisor positions at Douglas & Lomason was not only well within but beyond the range of what would be expected when compared with the relevant labor market, which, in this case, is the percentage of blacks in supervision in production occupations. The court rejects the plaintiffs' contention that the census figures offered by the defendant in its exhibits 127 through 131 should be ignored in favor of an analysis based upon an applicant pool having the same racial composition as the workforce at Douglas & Lomason. If the plaintiffs' theory were viable, one would expect the census category of supervisor and production occupations to reflect at least a 51.9 percent black racial composition relative to the civilian labor force, or even going so far as a 60.7 percent ratio relative to the blue-collar workforce. Under the plaintiffs' theory, every company's supervisory workforce should be reflective of the racial composition of its production workforce, regardless of the difference in skills and background between supervisory and production employ-

ees. While the plaintiffs also assert that the defendant's supervisory workforce is drawn primarily from its production workforce, there are clear examples of the company hiring individuals from outside this workforce to be supervisors and foremen, i.e., James Bowen, Robert Waller, Kelso Sims, Jerry Floyd, and Lamar Hays; and there is no evidence whatsoever that each time the company considered a promotional opportunity that everyone in the production workforce was considered on an equal footing nor that all production employees were considered at all. Indeed, the evidence is otherwise. Every one of the company's managers, supervisors, foremen and leaders who testified indicated that there are certain intangible criteria such as attitude and commitment which result in production employee "A" standing out from employees "B" through "Z".

While the subjectivity of the criteria of attitude and commitment could result in racial disparity in the potential for promotion, it is clear from the record evidence that the individuals recommended or considered for promotion included black individuals recommended by white foremen and supervisors, white individuals recommended by black foremen and supervisors, and individuals recommended by both.

Notwithstanding the rejection of plaintiff's theory that the relevant pool for promotions to leader and foreman should be the entire production workforce, the court finds that when comparing the percentage of blacks in the leader, foreman, and supervisor classifications at the company to the percentage of blacks in the production workforce, the ratio of the percentage black in supervisory categories (42%) to the percentage of blacks in production workforce (80%) is much higher than the similar proportion of the Bolivar County figure of 19 percent black in supervisors of production workers, when com-

pared with the blue-collar (60.7%) and manufacturing (58.2%) rates. Stated otherwise, if blacks at Douglas & Lomason were represented in supervision in the same percentage as in other industries in Bolivar County relative to the percentage in the production workforce, the benchmark would be only 25 percent, or seventeen percentage points less than what it has been. Thus, even from the perspective of plaintiffs, the defendant's performance relative to its production workforce far exceeds the performance of other Bolivar County companies.

The court finds this statistical analysis, demonstrating the performance of Douglas & Lomason relative to the overall Bolivar County figures, to be highly significant. In so doing, the court notes that for every other issue in this case, the plaintiffs have put forward external barometers of performance against which plaintiffs would have the court measure the company's actions which are here being challenged, even where there existed applicant-flow data on the hiring issue.

Manner of Selection

Selections for leader and foreman were made by the supervisors in the department where the vacancy occurred. Selections for supervisor were made by the plant manager. The plant manager's only involvement in selections to these positions was being informed by his supervisory personnel as to who was selected. The plant manager gave no instructions to his supervisory staff about what to consider in making their selections. From time to time, the plant manager would recommend an employee for a leader or foreman vacancy, but the selecting supervisor was not bound to select that person.

The position of leader is a probationary position which allows the company to evaluate an employee's

performance and potential to become a foreman, while allowing the employee an opportunity to determine if he is suited for the job and if not, to go back freely to a production job. A leader is paid 10 cents more an hour than the highest paid production person in his area, and the benefits he receives are the same as the production employees. Leaders have no disciplinary responsibility.

Foremen are selected from among leaders or are hired from outside the company. The foreman is paid hourly and is required to clock in. Foremen are paid $8.50 per hour, progressing over eighteen months to $9.25 per hour. The comparable hourly rate for a production employee is $7.06 per hour. The benefits of foremen and production workers are the same.

Salaried supervisors are selected from among foremen or are hired from outside the company. Supervisors are not required to clock in, they are paid substantially more than foremen, and their vacation and insurance benefits are better.

Although there was no standard set of criteria which was to be considered in making selections of leaders and foremen, the supervisors at the company consistently applied the following criteria in making decisions: attitude, attendance, desire, willingness to do more than required, willingness to help others, leadership abilities, commitment and concern for quality, and commitment to the company.

The company hired three foremen from outside. Lamar Hays was hired November 3, 1982, as maintenance foreman. He had been maintenance foreman during a prior period of employment at the company. James Bowen was hired May 21, 1984, as roll mill foreman. He had supervisory experience at Duo-Fast and Modern Line

Products, the latter being a mill operation. Jerry Floyd was hired September 7, 1984, as press foreman. He had supervisory experience at two other companies.

In addition to promotions to leader and foreman, reflected in PX 144A, the company promoted black employees to salaried supervisory positions above the level of foreman. Charlie West was promoted from pressroom supervisor, reporting to Bob Goodman, to second-shift superintendent, reporting to Mr. Grizzard. Richard Williams was promoted from supervisor to department head in final assembly. Harold Brown was promoted from foreman to salaried supervisor. E. W. Tolbert was promoted from second shift supervisor to production manager, replacing Howard Watson. Vera Watson was promoted from foreman to second shift supervisor, replacing Tolbert. Sylvester Parker and Charlie Lofton were promoted from foreman to salaried supervisors. All these promotions were made by Mr. Grizzard.

Job Offers Turned Down By Blacks

The unrebutted testimony of the company's supervisors also establishes that prior to most of the positions about which plaintiffs complain having gone to white employees, those same positions were offered to and turned down by black employees. Plaintiff's Exhibit 59 from the class certification hearing establishes that at least fourteen such offers were made to blacks within the employer's workforce, most of whom were in the general factory classification at the time the offer was made. This exhibit was buttressed by the anecdotal evidence provided through the testimony of the company's supervisors and managers.

While plaintiffs contend that this phenomenon is

not relevant, the court finds it highly relevant in evaluating the company's intent. In so doing, the court rejects the contention of the plaintiffs that the company did not show that whites did not turn down jobs. Clearly, two such individuals, Billy Utz and Otto Wolf, were identified and the burden was on plaintiffs to establish anything further.

Howard Watson, the former production manager at the company, and James Grizzard, the former plant manager and now executive manager, testified that they offered a promotion to Earnest Hall, one of the named plaintiffs in the case but that Hall turned down the offer because the job being offered was on second shift. Although Hall disputes this, the court finds the testimony of the company's managers, which is substantiated by the testimony of Richard Williams, the supervisor over the final assembly department, and E. W. Tolbert to be more persuasive. Moreover, there is no evidence to suggest that Mr. Grizzard or Mr. Watson would have fabricated a story as to Earnest Hall when they were involved in the promotions of other black supervisors and foremen, both before and after the offer made to Hall.

The court rejects as irrelevant the evidence that whites also may have turned down promotions or that blacks rejected job offers prior to Mr. Grizzard's arrival. The relevant evidence is that job offers were made to black employees for positions which eventually were filed [sic] by whites. Plaintiffs offered no countervailing evidence that the offers were not made.

Similarly, the court rejects plaintiffs' contention that the black persons who were offered jobs and who turned them down were selected because the company knew they would not accept promotions. The court believes the testimony of the company's supervisors that

these persons were considered more than once and after they had previously turned down job offers because these supervisors felt that these employees might accept a later offer, an offer for a different job, or an offer made by someone else. Such reasoning is not only credible because left unrebutted, but also because it is practical and reasonable in the context of the work environment at Douglas & Lomason.

In addition to the job offer which was turned down by Earnest Hall, Richard Williams made job offers to black employees James Lunsford, Willie Ward, Frank Hollingsworth and Isaac Wilson. Williams' unrebutted testimony is that the individual who was eventually chosen for this position, which was turned down by these four black employees, was a white employee, Robert LaPresto. When LaPresto left the company, he was replaced by a black employee Marilyn Holmes, who was recommended by Mr. Grizzard.

Charlie West, a black employee of the company, was promoted by Grizzard to second-shift superintendent from his former position as press-room supervisor. When Grizzard decided to promote a fellow black employee Sylvester Parker from foreman to supervisor, he consulted with West to get West's opinion of Parker's ability. Parker was later promoted to supervisor by Grizzard.

West was involved in promotions of two white employees, James Haney and Jerry Swinford. He testified unequivocally that prior to either Haney or Swinford being considered for promotion, he offered the positions they eventually received to two black employees--John Williams and Jerry Horn--who turned down the job offers. West believed both Haney and Swinford to be qualified for promotions to leader and to foreman at the time they were promoted.

E. W. Tolbert, who succeeded Howard Watson as production manager, was involved in the promotions of two white employees, Randy Daniels and Bobby Foster. However, prior to offering a promotion to Randy Daniels or to Bobby Foster, he offered the promotions to black employees Isaac Wilson, Tim Parris, Lucille Davis, Linda Green, Frank Hollingsworth, and James Lunsford. They all turned down the promotions. Parris, Lunsford and Wilson were also offered a job which eventually was awarded to a black employee, Vera Watson. Ms. Watson was recommended to Tolbert by Howard Watson. Watson also recommended another black employee, Riley Mitchell, to Tolbert. Mitchell was promoted by the company.

As with the case of Earnest Hall, Richard Grant turned down a promotion which was offered to him by Mr. Grizzard. While Grant disputes the fact of such an offer having been made, the court finds that such an offer was made and was turned down by Mr. Grant. There is no reason to believe that the plant manager would have fabricated such a story when it was he who later recommended Mr. Grant for another promotion at a point in time when Mr. Grant felt himself to be qualified, which he dates as the early summer of 1985. Moreover, the court finds the entirety of Mr. Grant's testimony and claims in this case are suspect, due to his admission of having perjured himself when he filed his EEOC charge. Grant was recommended by Grizzard, along with a fellow black employee Leonard West, to be considered for a promotion being made by Byron Kyle and Bob Goodman. Grant and West were interviewed by Kyle and Goodman, but the promotion eventually went to a white employee Jerry Swinford. Kyle and Goodman did not consider Grant to have the leadership ability when compared with Mr. Swinford.

Mr. Kyle was also involved in the promotions of white employees James Haney, Charlotte Sappington, Tony Litton and Chris Strickland.

Both Swinford and Haney were discussed by Kyle, Goodman and Charlie West. West agreed with the decisions to promote Haney and Swinford, both of whom he felt to be qualified based on their having worked for him. This was during the same period of time when West offered the promotional opportunities to black employees John Williams and Jerry Horn.

Kyle consulted with Charlie Lofton before making a decision on promoting Tony Litton. When Kyle asked Lofton his opinion of Tony Litton, Lofton agreed that Litton would make a good foreman. Litton was selected based on Lofton's recommendation and Kyle's perception of Litton's leadership abilities.

Chris Strickland was considered for promotion and was promoted based upon the recommendation of L. C. Taylor, a black supervisor.

Charlotte Sappington, a white employee, was considered, along with Marilyn Holmes, a black employee, for a leader/foreman position in the final assembly area. They were recommended in a management meeting after the supervisors in final assembly had exhausted the list of potential candidates in that area. Ms. Holmes was awarded the position in assembly, and Sappington was later considered for, and was awarded, a promotion in the press area. Both were considered because of their leadership ability on the work floor and in employee involvement groups.

Kyle was also involved in the promotion of Robert Springer. While plaintiffs imply that Springer's promotion

was the result of some personal relationship with Grizzard, the court finds no evidence of such favoritism and believes Kyle's testimony that Grizzard played no part in his decision.

Individual Claims

As noted above, the court finds that Hall and Grant turned down job offers for promotion to leader. While this is not a permanent disqualification from future consideration, it is relevant to the issue of the validity of their individual claims for relief where among the criteria routinely cited by the company's supervisors in selecting leaders were the candidate's attitude, desire and commitment to the company. In so doing, the court recognizes the fact that other black persons who turned down promotions were considered again. However, there is no evidence that the offers turned down by others involved the plant manager or Howard Watson, as was the case with Hall and Grant, and there is no evidence that either of these two managers ever reconsidered an employee who had previously turned down an offer.

Richard Grant was not qualified for and makes no claims for promotions prior to the position for which he was considered in 1985. When he did not get this promotion for which Mr. Grizzard had recommended him, Grant did not complain to anyone, including Grizzard. Grant was offered a promotion in the summer of 1987, which he turned down because of an injury to his wife. However, Grant never sought to consult with any company official to determine if the job offer could be extended until he was fully advised of his wife's condition. Hall had been a foreman and had been returned to production prior to Grizzard's arrival in October, 1982. He had held the foreman's position in anodizing. The only promotion to that position after October, 1982, was that of a black

employee, Harold Brown.

Robert Melvin and Kimroy Williams were not considered by Richard Williams because of his assessment of the attitude of each of these individuals. He considered Kimroy Williams to have been unable to get along with management in terms of his not wanting to go along with management plans for improving the production process. Melvin was not considered "foreman material" because he did not show any interest in the parts and simply did his job. Richard Williams had seen a change in Kimroy Williams' attitude by the time of Williams' promotion in 1987, which justified the promotion.

Alexander Smith was considered by his supervisor Tommy Lucas as not always having the kind of attitude about his work that would qualify him to be considered for a promotion to leader or foreman, although Lucas saw some maturing by Smith in later periods.

Moses Coleman worked as a fill-in for foremen who were out in the 1982 period before Mr. Grizzard came to the plant. In the opinion of his supervisor, Mr. Gerald Bardwell, Coleman was unable to handle the job and had people "goofing off on him." (JX 6, par. 5.)

There is no evidence to establish any distinguishing racial characteristic held by the named plaintiffs that would separate their situation from that of other black employees who were promoted by the company. The court can find no evidence that anything was said or done by any company official which indicates that race was a consideration in any failure to promote these individuals. While the evidence may support a conclusion that there were times that these individuals were overlooked or simply never came to the attention of management, such evidence cannot lead to any inference or conclusion of the

company's intent vis-a-vis these individuals, absent some specific showing that these named plaintiffs were racially distinctive relative to the hundreds of other employees, both black and white, who similarly were not considered or who did get the attention of management. No such showing has been made.

The court questions the probative value of plaintiffs' evidence of the comparative tenure of white and black employees prior to promotion. (PX 143A, 144.) By tracking the number of months between hire date and promotion to support the contention that blacks were promoted with greater seniority than were whites, the plaintiffs paint a distorted picture which attaches responsibility to Mr. Grizzard for the years before his arrival that a black employee was not promoted instead of giving him credit for promoting black employees his predecessors overlooked. From this perspective, the court finds that the only way Grizzard could have passed muster was to continue to bypass the senior black employees in favor of recently-hired black employees. This analysis also fails to take into consideration the fact that in almost every instance prior to selection of less senior white employees, more senior black employees had been offered the positions and had turned down the offers. Moreover, plaintiffs have chosen figures which attempt to compare the pre- and post-Grizzard periods for promotions, conveniently ignoring the fact that in the pre-Grizzard period blacks were given more favorable treatment -- the system was not neutral. Blacks were on average less senior than their white counterparts by some twenty-eight months.

TEMPORARY UPGRADES

Daniel Anderson, Jr. claims that he was not promoted to general maintenance and/or rack mainte-

nance positions in the shop department, and has not been given temporary work in those job categories because of his race. Tommy Hardy claims that he was not given temporary work in rack maintenance or general maintenance because of his race. (Pre-Trial Order, B 1 and 9.)

Statistical Analysis

The percentage of blacks in craft positions at Douglas & Lomason at year-end from 1982 through 1985 ranged from 66.7 percent to 73.7 percent. During the immediately preceding years, blacks were represented in the range of 57.1 percent to 63.0 percent in craft positions. These positions include die-setters, rack construction, tool and die I, tool and die II, and maintenance and electric. (DX 133.)

The comparable figure in Bolivar County from the 1980 Census shows blacks represented in precision production craft and repair occupations at 33.4 percent, or less than half of what the percentage at Douglas & Lomason was during the 1982-1985 period. When compared with the performance of other companies in Bolivar County, Douglas & Lomason exceeds expectations in its craft positions for all years including 1978-1985. However, as the later years during this period are approached, the company's performance in this area actually improves. (DX 134.)

Out of eight promotions to permanent craft jobs during the 1982-1985 period, seven were awarded black employees, representing 87.5 percent of the total. (DX 135.) When compared with the neutral range of what would be expected statistically, Douglas & Lomason not only falls within the neutral range in terms of its craft promotions, but in fact, it exceeds it greatly. (DX 136.)

System of Selection

Permanent promotions to craft jobs are handled through the company's job-bidding process, which is covered by the Collective Bargaining Agreement. Temporary upgrades to craft jobs occur from time-to-time when the company needs to fill those positions because an employee is on sick leave, on vacation, or when additional personnel are needed on short-term bases for special projects or due to an increased work load. Temporary upgrades are not bid and selections are made by the supervisors of the departments into which employees would be temporarily upgraded. The plant manager Mr. Grizzard never had any involvement in selections for temporary upgrades or permanent promotions, as all the selections are made by the supervisors in the various departments.

There is no contention that permanent promotions to craft jobs were handled in a disparate manner, with the exception of the job bid which resulted in the promotion of a white employee James Bruce, in which Daniel Anderson was one of the bidders. Plaintiffs do contend, however, that temporary upgrades to the rack maintenance and general maintenance positions were handled in a disparate manner during the period 1982 through 1985.

There is no evidence that any of the individuals receiving temporary upgrades to rack maintenance or general maintenance during the period of time about which the plaintiffs complain were unqualified for the temporary upgrades or less qualified than Anderson or Hardy. One of the individuals whose temporary upgrade is in dispute, Curtis Manus, was the foreman in the rack maintenance department prior to 1982 and the other individuals were selected based upon the departmental supervisors' knowledge of their work in the areas of

expertise required for maintenance jobs. (JX 22, p. 59.)

Employees in the general maintenance category perform mechanical repair work on the company's machinery, both on the floor and throughout the building, such as the boilers, the plumbing, concrete work, and floor repair. The rack maintenance employees construct and repair the metal racks used in the anodizing operation. Welding experience is an important asset in both general maintenance and rack maintenance. Part of the general maintenance responsibility is pipe welding, refabrication of broken machine parts, running pipes and welding brackets throughout the building. In the rack maintenance shop, the primary function of the job is welding.

When an employee is needed for temporary work in the general maintenance or rack maintenance department, the supervisor from that department requests of the supervisor from the department in which a general factory worker is assigned, that he be allowed to be used for the temporary work in the shop. It is up to the supervisor of the employee being requested to determine his availability and that supervisor can deny the requesting supervisor permission to use the employee. In many instances, this occurs due to the fact that the employees requested are often among the better employees working on the floor.

In making selections for permanent as well as temporary assignments to craft jobs, an employee's experience in the kind of work needed is more important than seniority. The company's Collective Bargaining Agreement recognizes that seniority is not the determining factor and the company is allowed to make its selection based on the company's assessment of the qualifications of those being considered.

Individual Claims

Despite his expressed interest in working in the shop, Tommy Hardy has never bid on a job in rack or general maintenance, although such job bids were in fact posted before, during and after the 1982 through 1985 period. He did, however, bid on another upgrade job in another department, which was awarded to a black employee. (PX 146, 148.)

During the same period of time, there were jobs in maintenance awarded under the bid process to black employees John Turner, Clarence Bolton, Roosevelt Love, Harry Rankin, and Mark Price, all of which occurred in 1983 through 1985.

Hardy's estimation of his qualification for work in the shop includes his experience (which he described as a "hobby") of welding in an auto body shop and a welding course he had in high school. There is no evidence that the limited welding experience Mr. Hardy claims to have had would have qualified him for work in the areas of the shop requiring welding, and there is no evidence of any other experience he may have had which is relevant to the work done in the shop.

Daniel Anderson bid on a general maintenance job that was awarded to a black employee and the rack maintenance job that was awarded to James Bruce. He admits that at the time of the bid for the rack maintenance job, that his welding experience was limited, although he had hoped to go back to school to gain more experience.

With regard to the promotion of James Bruce, the job bid which Mr. Bruce, Mr. Anderson, and others signed indicates that Mr. Anderson and Mr. Bruce were

considered and were interviewed. The notes of the interviewer indicate that he took into consideration the limited experience Mr. Anderson had in welding and the more extensive experience which Mr. Bruce had. The interviewer also noted Mr. Anderson's poor attendance and Mr. Bruce's attendance, which was described as "very good." The same notes indicate that a black employee with more seniority than Bruce had turned down the job. (JX 1, Attachment "E".) Anderson's attendance records which appear as Attachment "B" to the same exhibit confirm the interviewer's assessment of his attendance and Anderson's admission at trial of his limited experience in welding confirms the interviewer's assessment of the difference in qualifications between Mr. Bruce and Mr. Anderson. No evidence was presented by plaintiffs to refute the company's determination of the superiority of Bruce's qualifications.

Daniel Anderson also assessed his qualifications for general maintenance work as being related to his ability to do what he considered fixing machinery in the plant, as well as his auto mechanic's background from working in high school with his father. However, Anderson clearly indicated that the extent of this experience of "fixing" machines amounted to taking the front off the stitching machine on which he worked, which required the use of simple tools, such as an Allen wrench, a screwdriver and a pair of vise grips, and occasionally wiping oil off of this machine; and, on other machines in the press area, he indicated that he used a wrench to tighten a bolt on one of the presses and adjusted wheels on a glue machine that he worked on several years ago, which has not been used by the company for several years.

Wallace Bailey, the maintenance superintendent, testified that the type of work which Mr. Anderson felt would qualify him for general maintenance work was not

akin to the work done by maintenance personnel and amounted to no more than the everyday type of preventive maintenance that all employees must do from time to time on their machines.

Given the lack of experience of Hardy and Anderson in regard to their welding ability and there being no evidence of any other relevant experience, when combined with the lack of evidence of any of the individuals who received temporary upgrades having not been fully qualified for the work to which they were upgraded, the court finds nothing in the record which would indicate any disparate treatment with regard to either Mr. Anderson or Mr. Hardy.

In comparison to Mr. Anderson and Mr. Hardy, another black employee Alfred Kemp, Sr. testified credibly that he was indeed qualified to work in the shop and had done so on a temporary basis in the past. At the time of trial, Mr. Kemp had bid on and been promoted to a general maintenance job. (PX 146.) Once prior to this, Kemp had bid for a job in the shop, which was awarded to a more senior black employee.

While Kemp did not receive temporary upgrades to the shop during the period in dispute, the court finds that this situation is adequately explained by the company's practice of leaving the decision on a temporary upgrade to the employee's supervisor. As Bailey testified, an employee's availability is one factor which goes into the decision on whether an upgrade is made. Howard Watson, who is the individual who would have had to approve the release of Mr. Kemp for upgrades, testified that there were times that he received requests from the shop supervisors to allow Mr. Kemp to be utilized for temporary upgrades and Watson refused to let Kemp go because of his importance to the department in which he

had already been assigned. This occurred during the 1982 through 1985 period. The court finds this to be a reasonable explanation of the failure to upgrade Mr. Kemp during this period of time, especially when combined with Mr. Kemp's testimony that he has bid on two permanent assignments in the shop, with the first going to a more senior black employee and the second being awarded to him. Moreover, Kemp testified without hesitation that he felt that Douglas & Lomason Company had treated him fairly at all times and was a good place to work.

The court finds it significant that with all the upgrade jobs contained in the Collective Bargaining Agreement, there is a total absence of evidence that temporary upgrades to these other positions were handled in other than a neutral fashion. The court finds, based upon all the evidence with regard to this issue, which includes the parties' stipulation of temporary upgrades (JX 27), the stipulation and testimony of Daniel Anderson and the stipulation and testimony of Tommy Hardy, along with the testimony of company officials Wallace Bailey, Lamar Hays and Howard Watson, that the company acted in a manner consistent with its practice as allowed under the Collective Bargaining Agreement, based solely upon the qualifications of the individuals involved, combined with the changing needs of the company with regard to temporary upgrades, and that it acted without regard to the race of Mr. Hardy, Mr. Anderson or any of the other individuals involved. To conclude otherwise would require the court to ignore the great weight of the evidence about which there is no dispute that black employees at the company are more than well represented in craft positions and, when following the company's bidding procedure, receive a large number of such positions; and, in temporary upgrades to other higher paying jobs, there is no contention that black employees did not receive their fair share of those assignments.

There is simply nothing in the record which could lead the court to believe that the position of rack maintenance or general maintenance was somehow selected out from all other upgrade jobs generally and craft positions in particular as the sole area in which the company would discriminate in its selection of personnel for craft positions.

RETALIATION

Plaintiff Synovia Ann Jackson claims that she was discharged under the company's garnishment rule in retaliation for her having filed a charge of racial discrimination with the Equal Employment Opportunity Commission. (Pre-Trial Order, B 11). Plaintiffs also contend that the company retaliated against two other black employees, Jesse Overstreet and Belinda Cox, for filing EEOC charges and against Robert Haywood, III, for his father's filing of an EEOC charge, by discharging them for violations of its garnishment rules, when similar violations by other employees did not result in discharge. (Pre-Trial Order, B 7(a).)

Plaintiffs do not contend that there have been any white employees who violated the garnishment rules without being discharged, but contend that there were black employees of the company who did not file EEOC charges or whose relatives did not file charges, but who violated the garnishment rules and were not discharged. (JX 23, p. 1.)

The Company's Rule

The company's stated rule on employee garnishments, which is included in the company's shop rules, provides for discharge of employees who have four garnishments in a two-year period from separate creditors,

each of which has not been satisfied within a 30-day period after the company informs the employee of the existence of the garnishment. (JX 27.)

The parties disagreed as to how the policy was applied in practice. The court finds the application of the policy to have been as follows:

A garnishment received by the company is not considered against an employee's record unless the employee has failed to discharge the garnishment within thirty days after the company has spoken with the employee about it.

An employee would be discharged if the employee has four or more separate garnishments from different creditors within a two-year period, each of which has not been discharged or otherwise withdrawn or stayed within the 30-day grace period; a tax lien is considered the same as a garnishment. Since the July 1, 1985, effective date of a new law in the Mississippi Code (1972), § 93-11-111(9) (Supplement 1989), prohibiting employers from discharging or penalizing employees with child-support garnishments, child-support garnishments have not been considered as garnishments against an employee's record. However, garnishments for hospital or other medical debts are treated the same as all other nonchild support garnishments. If there are two or more garnishments by the same creditor within the two-year period, under the rule, they will be counted only as one garnishment even if they involve different debts and occurred in different years. The company did not count any garnishment which began before Ms. Haynes became personnel manager. The company used the date on which the first garnishment was discussed with the employee, not the date of the expiration of the grace period for that garnishment, to start the two-year period running. The company used the

date of the expiration of the grace period for the fourth garnishment, not the date of the discussion of that garnishment with the employee to determine the close of the two-year period. (JX 23, p. 2-3.)

Individual Claims

Synovia Jackson was discharged pursuant to the company's garnishment rule on March 13, 1985. Her discharge was based on a series of four garnishments, beginning with the garnishment from Beneficial Finance Company received by the company on January 26, 1984, and discussed with Ms. Jackson on January 31, 1984; a garnishment from Bynum Ford Company, received by the company on June 21, 1984; a garnishment from Delta Medical Center received by the company in September 1984; and a garnishment from Bolivar County Hospital received by the company on February 5, 1985, and discussed with Ms. Jackson on February 12, 1985. None of these garnishments were satisfied within the 30-day grace period, no two were from the same creditor and all four occurred within a two-year period, dating from January 31, 1984 (JX 23, B 3-6). Ms. Jackson also had two other garnishments while Ms. Haynes was personnel manager, including one from Defenbaugh Finance Company, received July 15, 1982, which was not released within the 30-day grace period but which was outside the two-year period; and a garnishment from Bolivar County Hospital dated May 31, 1983, and discussed with Ms. Jackson on June 8, 1983, which was cancelled within the 30-day grace period. (JX 23, B (4)(d)(1-2). Ms. Jackson had eight garnishments prior to Ms. Haynes becoming personnel manager, for which she was not discharged by Ms. Haynes' predecessor Harold Keeton. However, Mr. Keeton did discharge other black employees during his tenure as personnel manager. (JX 23, B(4)(b); JX 22, hh.)

Ms. Jackson filed a charge of discrimination with the Equal Employment Opportunity Commission dated October 16, 1984, and received by the commission on October 30, 1984. (JX 23, B(4)(c).)

Although Ms. Jackson was discharged after twenty-nine days had elapsed within the grace period for her final garnishment, the court finds the application of the policy was consistent with Ms. Haynes' application of the policy with regard to other individuals, i.e., if an employee were talked to on the 5th day of one month, the 30-day period is considered to have run on the 6th day of the following month. The end result is that depending on the length of the month in which the garnishment is received, the employee may actually get only 29 days but will, in most instances, have 30 days and in some instances will have 31 days. Moreover, even if there were a question to be resolved as to whether the application of the policy was contrary to practice, there is no evidence that Ms. Jackson would have satisfied the garnishment if given one, two or even three more days to have done so. Thus, it is immaterial as to whether she received 29 or 30 days absent a showing that she was prevented from satisfying the garnishments within the 30-day period due to the company's action, and this the plaintiffs have not demonstrated.

The court also finds that had the company intended to use the garnishment policy as a ruse to discharge Ms. Jackson because of the filing of her EEOC charge, it could just as easily have relied upon the four garnishments beginning with the May 31, 1983, garnishment from Bolivar County Hospital and disregarded the fact that the garnishment had been satisfied within the 30-day grace period. Obviously, the company did not do this.

The court finds it immaterial that Ms. Jackson had

several garnishments prior to Ms. Haynes becoming personnel manager, since it is obvious from the testimony of Harold Keeton that he was not fully aware of the existence of the policy, although the evidence clearly reflects that he did apply it in some instances. Unless it can be shown that garnishments which had not been counted against Ms. Jackson under the earlier regime were used to discharge her under the Haynes' regime, the court finds no validity in the comparison of the two periods.

Jesse Overstreet was discharged under the garnishment rule on December 6, 1985, pursuant to a series of four garnishments, including a garnishment from John Coleman received by the company on August 9, 1984, and discussed with Mr. Overstreet on August 13, 1984; a garnishment from Cleveland Lumber & Supply dated November 29, 1984; a garnishment from Travis G. Cassanova, discussed with Mr. Overstreet on March 7, 1985; and, a garnishment from Cleveland State Bank discussed with Mr. Overstreet on November 5, 1985. None of these garnishments were satisfied within the 30-day grace period; no two of them were from the same creditor; and all occurred within a two-year period dating from August 13, 1984. (JX 23, B(5)(c)(1-3 and 5.)

Mr. Overstreet filed an EEOC charge alleging racial discrimination in employment by the company on October 17, 1984. (JX 23F B(5)(b).)

Mr. Overstreet received one other garnishment within the two-year period from Brinson Funeral Home which was discussed with Mr. Overstreet on May 13, 1985, and was cancelled within the 30-day grace period. This garnishment occurred after the filing of Mr. Overstreet's EEOC charge and the court finds that had the company wanted to use the garnishment rule against Mr. Over-

street at this point, it could have ignored the 30-day grace period portion of the policy and used the Brinson Funeral Home garnishment as the fourth garnishment within a two-year period. Obviously, the company did not do this.

Robert Haywood, III was discharged by the Company on July 9, 1985, pursuant to the garnishment rule, based upon a series of four garnishments within a two-year period, including a series of three garnishments from Bolivar County Hospital, two of which were discussed with Mr. Haywood on September 1, 1983, with the third being received by the company in May 1984; a garnishment from Defenbaugh Company received by the company on March 26, 1985, and discussed with Mr. Haywood on March 27, 1985; a garnishment from Mississippi Telephone received April 18, 1985, and discussed with Mr. Haywood on April 29, 1985; and, a garnishment from Northwest Mississippi Regional Medical Center discussed with Mr. Haywood on May 29, 1985. None of these garnishments were satisfied within the 30-day grace period; although three of the six garnishments were from Bolivar County Hospital, there were four garnishments from different creditors; and all occurred within a two-year period, beginning with the September 1, 1983, date when Mr. Haywood was informed by the company of the existence of the garnishments. Haywood also had one other garnishment from Commercial Credit Company after Ms. Haynes became personnel manager, which was received by the company on June 18, 1982, and was discussed with Mr. Haywood on June 21, 1982 (JX 23, B(6)(c)(3-9).

Robert Haywood, III did not file a charge of discrimination, but his father Robert Haywood, Jr., also an employee of the company, filed a charge of discrimination with the EEOC on October 17, 1984. There is no evidence that Robert Haywood, Jr. was disciplined or

discharged because of having filed his EEOC charge. (JX 23, B(6)(a-b).)

The court finds that had the company wanted to utilize the garnishment rule to discharge Mr. Haywood in violation of the company's stated policy, it could have disregarded its policy of treating garnishments from the same creditor, Bolivar County Hospital, as a single garnishment and used them to discharge Mr. Haywood after his March 26, 1985, garnishment or his April 18, 1985, garnishment. Had it been after Haywood, the company did not have to comply with its policy and wait until it did to utilize the policy against Mr. Haywood. Thus, instead of the evidence proving a disregard of the policy or discriminatory application of the policy, Mr. Haywood's situation is clear evidence of an even-handed application of the company's policy.

Belinda Cox was discharged by the company under the garnishment rule on August 13, 1985, pursuant to a series of five garnishments, including two garnishments from Bolivar County Hospital, discussed with Ms. Cox on September 26, 1983, and September 10, 1984, respectively; a garnishment from Capital Credit, received September 28, 1984; a garnishment by Darron Franks, received June 7, 1985; and, a garnishment from Willodene Michie received July 11, 1985, and discussed with Ms. Cox on July 12, 1985. None of these garnishments were satisfied within the 30-day grace period; four of the five are from different creditors; and all were within the two-year period dating from September 26, 1983. (JX 23, B(7)(c)(1-5).)

Ms. Cox filed a charge of discrimination with the EEOC dated October 31, 1984. (JX 23, B(7)(b).)

The court finds that Ms. Cox could have been

discharged under the company's policy had it been the company's desire to violate its stated practice after the Darron Frank's garnishment by disregarding its policy of counting the two Bolivar County garnishments as a single garnishment. However, it is obvious that the company did not do this, but instead, followed its stated policy, despite the fact that Ms. Cox had already filed her EEOC charge in October, 1984.

Other Black Employees Discharged By Haynes

Lester Archie was a black employee of the company, who was discharged under the garnishment rule on June 11, 1986, although he had not filed an EEOC charge and had no relative who filed an EEOC charge. (JX 23, B(8)(a-c).)

James Humphrey was a black employee of the company who was discharged under the garnishment rule on August 13, 1985, although he had not filed a charge of discrimination against the company and had no relative who filed an EEOC charge. (JX 23, B(9)(a-d).) Humphrey was discharged on the same day as Belinda Cox, who did file an EEOC charge.

Jimmie James was a black employee of the company who was discharged under the garnishment rule on July 22, 1987, although he had never filed an EEOC charge against the company and had no relatives who had done so. (JX 23, B(11)(a-d).)

Discharges by Keeton

Under Mr. Keeton's tenure, the company discharged the following black employees under the garnishment rule: David Colburn, July 27, 1979; Lee Curry, January 24, 1980; Leon Caldwell, March 29, 1979. None

of these individuals had filed EEOC charges against the company.

Black Employees Who Were Not Discharged

To support their claim of retaliatory discharge, the plaintiffs presented examples of black employees whom plaintiffs claim violated the garnishment rule, but were not discharged. Under plaintiffs' theory, these employees were not discharged due to the fact that they had not filed EEOC charges or were not related to individuals who had done so. Included in this group are Roosevelt Buckner, Charles Daniels, Larry Drake, Hazel Lofton, Alice Stapleton, Larry Wesley, and Eddie Williams.

While the parties' stipulation (JX 23) and the testimony of Personnel Manager Haynes did not conclusively resolve the failure to enforce the company's policy against Buckner, the company's evidence with regard to the other individuals is convincing.

Most convincing in the company's rebuttal to representations of the plaintiffs is the fact that Hazel Lofton is the sister of Robert Melvin, who not only filed an EEOC charge but also is one of the named plaintiffs in the case. Thus, while the plaintiffs would offer Ms. Lofton as an example of disparate treatment in favor of black employees who did not file EEOC charges, and at the same time reject the company's explanation as to Ms. Lofton, the court finds that the example of Ms. Lofton, without more, overwhelmingly belies the contentions of the Plaintiffs as to retaliatory discharge; for just as was the case for the individuals who are alleged to have been discharged in retaliation for having filed EEOC charges, or having relatives who did so, Ms. Lofton has been treated in exactly the same manner and given the benefit of and consistent application of the policy. This was true

in this case, despite the fact that the personnel manager has at all times been aware of the fact that Ms. Lofton is the sister of Robert Melvin, a named plaintiff in this case.

The court accepts the company's explanation with regard to Ms. Lofton. The company applied its policy using the expiration date of the 30-day grace period for the fourth garnishment as the outside date for purposes of measuring the two-year period of the company's rules. As such, Ms. Lofton would not have been subject to discipline until February 14, 1986. This is more than two years from the opening date of the two-year period, January 30, 1984, which represents the date that the company discussed the first garnishment in the series with her. Just as in the case of the individuals who filed the EEOC charges or the case of Robert Haywood, III, had the company wanted to retaliate against black employees whose relatives filed EEOC charges, it could easily have taken the position espoused by plaintiffs and dated its two-year period from the receipt of the final garnishment or from the expiration date of the grace period of the first garnishment. That it did not do so, but instead adhered to its stated policy, is clear and convincing evidence of the absence of retaliatory intent. (JX 23, C(19)(a-e).)

The court accepts the explanation of the company with regard to why Charles Daniels was not discharged under the company's garnishment rule, since only the last four of the garnishments received by Mr. Daniels would have occurred after the time that Ms. Haynes began as personnel coordinator in September, 1981, and only two after she became personnel manager in March, 1982. There is absolutely no evidence that Ms. Haynes ever counted a garnishment against an individual that occurred prior to the time that she became personnel manager. Of the four after September, 1981, two were from the same creditor, the Internal Revenue Service. (JX 23, C(17)(a-

e).)

The court accepts the company's explanation of its application of the policy to Alice Stapleton, who filed a bankruptcy petition on September 27, 1985, which not only had the effect of giving her protection from creditors pending resolution of her bankruptcy petition, but also prevented the company from counting the garnishments against her. Moreover, the only series of garnishments after Ms. Haynes took over as personnel manager which would have amounted to four within a two-year period, would include the garnishment by Central Bell, which was discussed with Ms. Stapleton on June 22, 1984. She also had a garnishment from Bolivar County Hospital on August 21, 1984, and Jessie's Auto Repair on March 4, 1985. The fourth garnishment in this series was for Bolivar County Hospital, which under the company's policy, would not have counted against Ms. Stapleton. Even so, it was stayed by the bankruptcy petition. The next garnishment from AAA TV Rental on September 16, 1985, was also stayed by the bankruptcy petition, and the final garnishment in the series was also from Bolivar County Hospital, which would again not be counted against Ms. Stapleton. Thus, there would have only been three garnishments within a two-year period--South Central Bell, the first Bolivar County Hospital, and Jessie's Auto Repair. As such, it is obvious that the company followed its policy with regard to Ms. Stapleton. (JX 23, C(20)(a-e).)

The evidence with regard to employee Larry Drake, as it appears in Joint Exhibit #23, is on its face a clear indication that the company followed its policy with regard to Mr. Drake in not discharging him for the garnishments received during the period January 1982 through the end of 1984. Applying the company's policy of not counting a second garnishment from the same

creditor against an employee within the two-year period, the first two garnishments in the series for Mr. Drake would date from the discussion with Mr. Drake on February 5, 1982, about the first Bolivar County Hospital garnishment; the second garnishment from Bolivar County Hospital would not have counted against Mr. Drake and the two-year period dating from February 5, 1982, would have encompassed only the Valley Bank garnishment on May 18, 1983, and the ABC Furniture Company garnishment on December 13, 1983. The two-year period would have expired prior to the CIT Finance garnishment on December 14, 1984. As such, the company's application under its policy was consistent with its application to others who were not discharged as well as some of the individuals who were discharged. The court notes, for example, a similar series of three garnishments for Bolivar County Hospital for Robert Haywood. (JX 23, C(18)(a-d).)

The court accepts the company's explanation with regard to employee Eddie Williams, wherein the evidence clearly indicates that applying the date of discussion with Mr. Williams on the Nowell Lumber Co. garnishment on June 9, 1983, representing the first garnishment in the series, the two-year period beginning with this garnishment would have ended prior to the expiration of the 30-day grace period on the James Holmes' garnishment, which was discussed with Mr. Williams May 14, 1983. Moreover, the garnishment from James Holmes was released on June 14, 1985, which under the explanation given by Personnel Manager Haynes would have been within the 30-day grace period and would not have counted against Mr. Williams in any event. (JX 23, par.22(a-e).)

What this leaves in the way of evidence of the company's failure to discharge black employees who did

not file EEOC charges are the examples of Roosevelt Buckner and Larry Wesley.

The court finds that the company did not violate its policy with regard to Larry Wesley. The first garnishment from City Finance is dated October 16, 1981, shortly after Haynes became personnel coordinator and prior to her becoming personnel manager in March 1982. Of the remaining four garnishments, two were from the same creditor, William O'Hare, thus constituting but a single garnishment for purposes of the company policy. Thus, there was no series of four garnishments after Ms. Haynes became personnel manager. (JX 23, C(21)(a-b).) Moreover, the court notes with regard to Larry Wesley, that while the series of garnishments which he accumulated began almost simultaneously with Ms. Haynes' tenure as personnel coordinator and concludes in the early part of 1983, the time period of significance with regard to Jackson, Overstreet, Haywood and Cox began well after the period in which Mr. Wesley received his last garnishment. As such, to compare the performance of the personnel manager during the earliest periods of her tenure when the record is clear that she was going through a learning process on all matters related to personnel, with later periods of time when one can presume that things were running more smoothly, is not equitable. As such, the court gives no material weight to the situation involved with Larry Wesley, even if one were to count from the date Haynes became personnel coordinator.

As regards Roosevelt Buckner, whose garnishments fall within the same period as the individuals who were discharged under the garnishment policy, the court finds the fact of the company's failure to discharge Mr. Buckner to be insignificant relative to the greater weight of the evidence, especially with regard to the company's treat-

ment of Hazel Lofton. The court also concludes that the case of Mr. Buckner is distinguishable in that two of the four garnishments which he received were, in fact, discharged, albeit outside the 30-day grace period. (JX 23, C(16)(a-d).)

The court rejects as immaterial the evidence of employees who received garnishments prior to Ms. Haynes' tenure as personnel manager and who were not discharged by the company. In this regard, the court notes that Ms. Haynes' predecessor, Harold Keeton, was uncertain even at the time of trial if he had, in fact, discharged anyone under the company's garnishment policy. As noted earlier, unless it can be shown that Ms. Haynes relied at all upon her predecessor's actions or failure to act, what he did or did not do in this regard simply has no relevance. (JX 23, C(23-27).) The court concludes that, based upon all the evidence contained in the parties' Stipulations on Garnishments (JX 23) and the testimony of Personnel Manager Patty Haynes, the company's policies and practices with regard to discipline of employees for garnishments are as stated by the company, and its application of the policy has been consistent and even-handed with regard to the employees who have had to be disciplined under, or counseled under, the company's policy.

The court finds no inconsistency in the isolated example of Buckner which is outweighed by the fact that Jackson, Overstreet, Haywood and Cox did, in fact, violate the company's policy; they were treated favorably in the company's application of the various parts of its policy; and, the plaintiffs' own example of an individual treated favorably under the policy, as the plaintiffs would have that policy interpreted, is the sister of one of the named plaintiffs in the case, a fact which was known to the company. Moreover, the stipulation of the parties

includes examples of black employees who were discharged and who did not file EEOC charges.

One final claim of retaliation has been levied by plaintiff Catherine Spells, who charges that the company transferred her from the final assembly department to the press room and then, for a time, moved her from job to job within the press room, because she filed an EEOC charge. Ms. Spells, who has a G.E.D., initially worked in the press room from 1978-1982. In 1982, she requested a transfer to final assembly, a "cleaner job," which was granted sometime in 1982. In October, 1984, Ms. Spells filed a charge of discrimination with the EEOC; she submitted amended and supplemental answers in April, 1985. In September, 1985, Ms. Spells was involuntary [sic] transferred from final assembly back to the press room. According to Ms. Spells, she was not given a reason for the move, except that "they had to move some people around," but approximately eight or nine others, all black, were also transferred at the time. Thereafter, Ms. Spells requested that she be transferred to subline automation; again, this request was honored. She last worked for the Company in May, 1986.

According to Ms. Spells, at or about the time of her transfer back to the press room in September, 1985, L.C. Taylor, a black supervisor in the press room, told her that Mr. Grizzard had told him that he wanted Ms. Spells fired. Mr. Taylor agreed that Mr. Grizzard had expressed some concern over Ms. Spells' attitude toward her job as a press operator (Mr. Grizzard had seen Ms. Spells laugh after running scrap on a press machine) but denied that Mr. Grizzard said he wanted Ms. Spells fired. Mr. Taylor stated that, except for the one incident, he never had a problem with Ms. Spells. Mr. Grizzard admitted that he spoke with Mr. Taylor about Ms. Spells and the need to instruct her about how to run the press machine but

denied saying that she had a bad attitude or that she should be fired.

The court finds that Ms. Spells has presented no evidence to support her allegations. It is uncontested that at the time Ms. Spells was transferred, other workers were also transferred from final assembly because of the need to realign certain departments. Indeed, if the company had sought to retaliate against Ms. Spells for filing her EEOC claim, it would, at the very least, have transferred her before it did. The court also finds the testimony of Mr. Taylor and Mr. Grizzard credible and convincing. Their testimony indicates to the court that although company officials may have been concerned about Ms. Spells' attitude, they harbored no animosity toward her and did not seek retaliation for her protected actions. In fact, Ms. Spells' subsequent transfer to subline automation, which was effected at her request, demonstrates the company's desire to work with its employees.

HOSTILE ENVIRONMENT

Plaintiffs originally alleged that the company treated black employees differently and less favorably than white employees, in that supervisors verbally and physically harassed black employees, and used vulgar or racially derogatory language to them, assigned black employees to the relatively undesirable handjack position in the buffing department in a discriminatory manner, and refused to allow some partially-disabled black employees to perform their tasks sitting down, while allowing similarly situated whites to do so. (Pre-Trial Order, 7(a), p. 9).)

The sum total of the evidence with regard to these allegations of what constitutes a claim of hostile environment in the form of disparate treatment of black employees amounts, at best, to proof of isolated acts of the use

of vulgar or racially derogatory language by no more than two or three company officials and a single instance of physical contact between a company official and a single black employee, all occurring over a period of three or more years. What is also abundantly clear is that when reported to the appropriate company officials, every complained of incident was immediately followed by affirmative company action in the form of apologies to the employees involved, counseling of the managers involved, and/or discipline of those management officials. Moreover, the plaintiffs' allegations relate to the time period after the arrival of the Plant Manager James Grizzard, with there being not a scintilla of evidence that Grizzard participated in or condoned any of the complained of acts, with the exception of possibly two instances of the use of vulgar language, both of which, under the undisputed circumstances, the court finds to have been justified, and one, about which the union filed a grievance, for which Mr. Grizzard apologized. The allegation with regard to discriminatory assignment of employees to an undesirable job in the buffing department is wholly unsupported by the record evidence. Likewise, the evidence in support of the plaintiffs' claim as to disabled black employees not being allowed to perform their tasks sitting down is in its entirety without foundation.

Plaintiff Daniel Anderson, for example, accuses Mr. Grizzard of using the word "hell" in a situation where, upon Anderson's return from the doctor, he asked to take a break which he had missed while he was gone. Upon Anderson's supervisor's refusal to let him take his break, he left the workplace and clocked out for the day. He was confronted the next day by Mr. Grizzard who asked him, quite understandably, who in the hell did he think he was to be able to just leave because he couldn't take his break. Anderson also claims that buffing room supervisor Tom Garner on a single occasion told him to get his

"black ass back on the buffing wheel," although his reference to this was not time specific; and he states further that Production Manager Howard Watson on a single occasion referred to him as "boy." Anderson offered no other evidence of what he considered mistreatment of him by company officials in terms of the use of vulgar or racially derogatory terms. Yet, while he claims that the cursing about which he complains in his EEOC charge occurred before the filing of the EEOC charge in October 1984, it is significant that when he completed EEOC questionnaires in March and April of 1985, in answer to the specific question, "Has any supervisor cursed you," he answered, "No." The individuals allegedly involved in these incidents all deny the accusations against them, and the court believes these company officials in light of the incongruity of Anderson's failure to include such serious allegations on the EEOC questionnaires at a time close in proximity to the filing of his EEOC charge regarding these events, and the incredibility of his statements that there was absolutely no profanity used in the manufacturing facility at Douglas & Lomason prior to October 1, 1982, when Mr. Grizzard arrived. The court finds the totality of Mr. Anderson's testimony with regard to this issue incredible and unbelievable.

Plaintiff Mose Bailey testified that Foreman Tony Litton on one occasion called him a "nigger" and on another occasion a "black son of a bitch." In both of these instances, a fellow employee, Lee Collins, was supposedly present but was not called by plaintiffs to corroborate his testimony. Bailey also claims that on a single occasion he heard Howard Watson call black Foreman Monroe O'Neal a "son of a bitch," and that he heard press-room supervisor Byron Kyle tell black employee Dorothy Woods "god-dammit, get out of the way." He also claims to have been cursed by black pressroom supervisor Charlie Lofton with regard to Bailey

not doing his work properly. As with Anderson, for reasons that could only indicate the non-occurrence of the alleged events, Bailey failed to indicate in the EEOC questionnaires which he completed and signed, with the assistance of counsel, that he had been called "nigger" and for the same obvious reasons failed to mention in his deposition the use of the term "black son of a bitch," although he was testifying to the same incident about which he testified at trial. With regard to the Howard Watson incident with Monroe O'Neal, Bailey testified that he had no idea what the conversation was about and that the only term he heard was "son of a bitch." The incident with Byron Kyle and Dorothy Woods, according to Bailey, occurred when Kyle was trying to show Woods how to perform her job. All the company officials involved in these incidents denied the allegations against them, and the court credits their denials in light of the failure of Bailey to mention these incidents regarding racial epithets before the EEOC and in his deposition. The court notes further that Bailey's production manager, Howard Watson, who is alleged by others to have been harsh toward them, never cursed Bailey, and as far as Bailey knows, only used profanity once during the entire time that Watson worked at the plant. If any of the testimony of Bailey is to be believed, the court finds that it amounts to no more than isolated use of profanity, not uncommon in the industrial environment. Notably absent from the testimony of Bailey is any claim by him that he reported to company management any of the name calling or profanity.

Plaintiff Moses Coleman also makes the incredible claim that before the arrival of Mr. Grizzard, there was no shouting or use of profanity by company supervisors in the workplace. However, even if one were to give any credence to such a claim, the only things that Coleman was able to observe were instances in which Howard

Watson allegedly pointed and shook his finger in the face of black employee James Wolf; Howard Watson shouting at Earnest Lee and James Wolf; and, Howard Watson telling employees in the rack unloading area to "get the damn job did." Coleman admitted that although he could see the shaking of the finger and the shouting, he could not hear anything about what was being said; that Howard Watson never pointed his finger in Coleman's face; and that all of what he observed occurred in a section of the plant which is populated almost exclusively by black employees. Even if all of what Coleman testified about is correct, this evidence is only a further indication of the occurrence of typical events in an industrial setting.

Plaintiff Earnest Hall testified that he was considered a troublemaker by the Plant Manager and unsuited for promotion because, on a single occasion, he and other black employees complained to Plant Manager Grizzard about their belief that the employee-of-the-month award was going exclusively to white employees and that black employees were being denied that award. The court finds nothing to support this allegation. The record clearly reflects that after Mr. Grizzard's arrival, black employees received the employee-of-the-month award in numbers comparable to their representation in the workforce, and although there was a period of time when whites received the award two months in a row, the award overwhelmingly went to black employees. Moreover, the court finds that instead of a negative reaction, the plant manager's action was positive wherein Hall admits that after speaking to Mr. Grizzard about what black employees perceived as a problem, the employee-of-the-month awards about which they complained went to black employees. Hall's testimony, as that of the other witnesses, when taken in the light most favorable to the plaintiffs, instead of establishing any mistreatment of blacks, indicates the ability of blacks to complain to the plant manager and have their concerns

resolved, as well as the nondiscriminatory nature of the company's employee-of-the-month program.

Plaintiff Tommy Hardy claims to have witnessed an incident involving Tom Garner and black employee Oliver Robinson, in which the two had words about Robinson's tagging of some parts in his role as inspector. However, the court questions Hardy's testimony since his version of this incident differs so greatly from the version offered by Oliver Robinson. Other than his testimony with regard to Oliver Robinson, Hardy testified that Tom Garner had called him "boy," but that Garner stopped doing that when Hardy told him he didn't like being called that; and that Garner would use curse words saying things such as "shit" and "damn, Hardy, you don't pay attention." The court finds nothing in Hardy's testimony that could be evidence of anything other than a typical industrial environment in which some profanity is to be expected.

Plaintiff Robert Melvin claims that Howard Watson cursed black employees. Even so, the reference in his EEOC charge to supervisors cursing black employees was a single instance when he heard Howard Watson tell Foreman Robert LaPresto, "if they can't get the job done, get them out." In Melvin's mind, this referred to black employees. Melvin also indicated that the reference to uneven discipline in his EEOC charge referred to the instance in which his sister Pearline Melvin was disciplined on a single occasion, although he freely admitted that of his relatives in the company's employ, none had been disciplined and he himself has not been disciplined. Unlike some of the plaintiffs who testified, Melvin stated that Howard Watson had never called him "boy," and admitted that he would hear the word "damn" used by the employees in the workplace "maybe once a week." Melvin stated further that he was a union steward and had been so for 14 years, but had never filed a grievance with

regard to race discrimination although there is a nondiscrimination clause in the Collective Bargaining Agreement. The court finds nothing in the evidence presented by Robert Melvin which is inconsistent with what one expects to find in a typical plant environment.

Plaintiff Alexander Smith referred to a single occasion in which Tom Garner, in response to employees in his area turning off their machines too early, made the statement that they were standing around like a bunch of "cows and dogs," which Smith originally thought was a racially derogatory statement. Smith admitted, however, that at the same time, he called Mr. Garner "less than a man." Of interest is that Smith voluntarily transferred to the buffing department in 1984. He admits that neither Garner nor any other supervisor ever cursed him, and that although he saw Garner shouting at employees, he has no idea what was being said or whether it was work-related. In addition, Smith's testimony is no more convincing than that of any other witnesses except to confirm the existence of a typical work environment. Smith freely admitted that the area in which they worked was very noisy.

Plaintiff Kimroy Williams testified that he overheard Robert LaPresto tell Dan Anderson to "get his ass back on the job"; and, that on a single occasion, he observed Howard Watson talking in a loud tone of voice to black employee Lealtha Talton about packing bad parts, at which time Watson was pointing at the parts. Williams freely admits that the only time he heard LaPresto use profanity was the one instance about which he testified and that LaPresto had never used profanity toward him. He also admitted that the only time he had seen Howard Watson doing anything he thought to be mistreatment was the one incident he described. Like Melvin and many of the other Plaintiffs in this case,

Williams has several relatives who, like he, have not been disciplined or treated unfairly with respect to the use of profanity, racial epithets or loud tones of voice. The court finds nothing in Williams' testimony other than evidence of a typical industrial work environment.

James Pritchett, in his capacity as union president, testified that black employees had complained to him about their treatment by Howard Watson; that on one occasion he saw Howard Watson talking in a loud tone of voice to employee Ollie Hudson, while pointing his finger saying, "I told you to run another color on this extruder"; that he saw Watson pointing his finger at Pearline Melvin "instructing her," although Pritchett could not hear what was being said; and that on a single occasion, Howard Watson pointed his finger at Pritchett and told him to get back on his job, again using a loud tone of voice. He also testified about a grievance involving employee James Wolfe, who, while on his break came into Mr. Watson's area, and was told by Watson to get back into his own area. At the time Wolfe was talking to a foreman in Watson's area about money owed him. All of the events about which Pritchett testified occurred in the area supervised by Watson, which is, or was at the time, approximately 95 percent black. Pritchett admitted that he had never heard Howard Watson curse employees, and that, in the course of conversation, Watson routinely uses his hands to get a point across. He also admitted that he did not see every conversation Howard Watson had with white employees. Pritchett also had several conversations with Patty Haynes and James Grizzard about Howard Watson and his conduct toward employees. Pritchett admitted that after these conversations, Grizzard would talk to Watson and that Watson would improve. The only conclusion to be drawn from Pritchett's testimony is that he observed events which are not uncommon in an industrial environment, and he offered nothing which

would point to the focus of any action having been toward black employees.

In the course of his union duties, Pritchett met with Haynes and Grizzard on regular occasions, and at one point filed a grievance against Mr. Grizzard for his alleged use of the phrase "son of a bitch." The grievance was resolved by Grizzard apologizing and explaining in writing that he did not intend the words to be directed at any of the employees who were within earshot, as was requested in the grievance by Pritchett.

Pritchett also testified as to disparity in the use of stools by employees. A single white employee was allowed to sit on a stool as a result of a worker's compensation settlement. One black employee was not allowed to sit after having been instructed to bring in a medical excuse and having not done so. Another black employee was allowed to sit until his job ran out, at which time, being unable to perform any available work, he was allowed to take early retirement after arrangements had been worked out on his behalf by the company.

The court finds that Mr. Pritchett, above all people in the plant, due to his position as union president, should be a knowledgeable witness in terms of his ability to provide evidence in support of the claim of mistreatment of black employees. To that extent, the court has considered the testimony of Mr. Pritchett and finds that instead of a hostile environment created by and condoned by Mr. Grizzard, what in fact existed was a typical industrial environment in which problems such as those about which Pritchett and others complain, should have been and were resolved through the union management process as established by the collective bargaining agreement, and that everything about which Pritchett testifies and about which these employees complain, was work-related and

reasonable management acts.

The only other factual situation of any note is that involving black employee Oliver Robinson. The court finds that there was a heated confrontation between Robinson and Tom Garner, which was reported to Plant Manager Mr. Grizzard, and Mr. Garner was promptly disciplined in the form of a two-week suspension.

Taking the Robinson incident along with the grievances filed, the informal meetings of the union officials and management regarding Mr. Watson, and the company's response to complaints about Garner, there is absolutely no evidence that at any time the company encouraged or condoned, either through action or inaction, any mistreatment of black employees by supervisors. Further, the court finds that there has not been a single incident raised by the plaintiffs which was not work-related or that there is no credible evidence of the use of racial epithets; and, even if true, those incidents were isolated in nature, spanning a period of three to four years and involving less than a handful of black employees.

III. CONCLUSIONS OF LAW

A. Jurisdiction

This court has jurisdiction of the instant action under both 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.[3] Plain-

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[3] Throughout the entire course of this litigation, including trial, counsel have diligently kept the court apprised of new developments in the law and their import to this case. The question of whether the

(continued...)

tiffs' claims are based on disparate treatment, disparate impact, and intentional discrimination. Plaintiffs have limited their challenges to claims of discrimination occurring on or after October 1, 1982, when Mr. Grizzard arrived at the plant. (Pl. Brief at 229).

B. Hiring, Promotion, and Temporary Upgrade Claims

Intentional discrimination in a disparate-treatment case must be established by either direct or circumstantial evidence. Wheeler v. City of Columbus, 686 F.2d 1144, 1150 (5th Cir. 1982).

The court finds that there is no direct evidence in this case that any of the plaintiffs were treated in a discriminatory manner. In the absence of direct evidence, it is clear that the McDonnell-Douglas guidelines apply.

To establish a prima facie case of racial discrimination in a Title VII action where there is no direct evidence of discrimination, a plaintiff must prove (i) that he belongs to a racial minority; (ii) that he applied and was

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[3](...continued)
Civil Rights Act of 1991 applies retroactively has not been argued by the instant parties, nor has this question been decided by the Fifth Circuit. Three other circuits--the Sixth, Seventh, and Eighth--have squarely addressed the retroactivity issue and found that the 1991 act applies prospectively only. See Huey v. Sullivan, No. 91-2908, 1992 WL 105393 (8th Cir. May 21, 1992); Mozee v. American Commercial Marine Service Co., No. 90-2660, 1992 WL 92511 (7th Cir. May 7, 1992); Fray v. Omaha World Herald, 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992). This court agrees with the reasoning contained in those decisions and does not consider the recently enacted law to affect the conclusions reached herein.

qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

If the plaintiff succeeds in proving a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for rejecting the employee. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the defendant meets this burden, the plaintiff must then prove that the defendant's reasons were a pretext for discrimination. Burdine, 450 U.S. at 253. The plaintiff retains at all times the burden of persuasion. Id. See also Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231, 1233 (5th Cir. 1989) (when § 1981 and Title VII are alleged as parallel bases of relief, same elements of proof are required for both actions).

Further, plaintiffs "must prove discriminatory intent and demonstrate more than 'the mere occurrence of isolated or accidental or sporadic discriminatory acts.' They must show by a preponderance of the evidence that 'discrimination was the [defendant's] standard operating procedure -- the regular rather than the usual practice.'" Carroll v. Sears Roebuck & Co., 708 F.2d 183, 190 (5th Cir. 1983) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977)).

However, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not indicative of a pattern or practice of racial discrimination in violation of Title VII. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied,

406 U.S. 957 (1972).

A plaintiff may establish a prima facie case of disparate treatment using statistics alone "if the statistics show a 'gross disparity' in the treatment of workers premised upon discriminatory factors such as race." Page v. U. S. Industries, Inc., 726 F.2d 1038, 1046 (5th Cir. 1984) (citing Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977)).

Although not an absolute defense, the "bottom-line" defense can be utilized to rebut inferences of intentional discrimination. In Connecticut v. Teal, 457 U.S. 440, 454 (1982), a disparate impact case, the Supreme Court noted that statistical evidence showing that the employer's work force was racially balanced may be utilized to prove lack of discriminatory intent:

> The Court has stated that a nondiscriminatory "bottom-line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that a particular action had been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided."

Teal, 457 U.S. at 454 (citations omitted).

Teal, which rejected the "bottom-line" defense in a disparate impact case, has since been analyzed in the context of disparate treatment:

> The Supreme Court's rejection [in Teal] of the "bottom-line" defense was in the context of proof of disparate impact, for which proof of discriminatory intent is unnecessary. Where, as here, plaintiff asserts disparate treatment, intent is the determinative issue. Although proof of the racial mix of an employer's candidates for its work force is insufficient to conclusively establish that an employer's actions were not discriminatorily motivated, a court is "entitled to consider the racial mix of the work force when trying to make determination as to motivation."

Peters v. Lieuallen, 568 F. Supp. 261, 268 (D. Or. 1983) (citations omitted), aff'd, 746 F.2d 1390 (9th Cir. 1984).

Claims based on a disparate impact theory of employment discrimination involve employment practices that are "facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

In establishing a prima facie case of disparate impact, the plaintiff "must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue." Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. 1981), cert. denied, 459 U.S. 967 (1982).

Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988), held that, in appropriate cases, claims of racial discrimination that arise from subjective or discretionary employment practices may be challenged under

the disparate impact model. Watson, 487 U.S. at 991. In this respect, plaintiffs must proffer "substantial" statistical evidence that a specific subjective practice resulted in a disparate impact on minority individuals seeking jobs or promotions. Id. at 994-95. However, the use of subjective decision-making in employment practices does not create an inference of discriminatory conduct. Id. at 992, 999.

The court finds that plaintiffs' contentions of racial discrimination under a disparate impact theory concerning Douglas & Lomason's hiring and promotion practices are unfounded. As required by the Supreme Court in Watson and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (which is dispositive of the disparate impact issues in this case), plaintiffs must identify the specific employment practice they challenge for this case to be treated under the disparate-impact model. The court finds that the plaintiffs have failed to identify which employment practice they allege adversely impacted against blacks.

The Supreme Court granted certiorari in Wards Cove to resolve matters on which the court was evenly divided in Watson "for the purpose of addressing ... disputed questions of the proper application of Title VII's disparate impact theory of liability." Wards Cove, 490 U.S. at 649-50.

It is clear from Wards Cove that the plaintiff, at all times, bears the burden of proving discrimination in a disparate impact case. Id. at 659-60. The defendant employer carries a burden of production of a business justification for the employment practice in question, but only after the plaintiff has established a prima facie case of discrimination. Id. at 658-59.

Plaintiffs have attempted to detract from the true

holding of Wards Cove by distinguishing its factual pattern from that in the instant case. In essence, plaintiffs have attempted to redefine the Supreme Court's holding concerning the causation factor in a disparate impact case. Indeed, in discussing the causation factor, the Wards Cove Court quoted from Justice O'Connor's opinion in Watson:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged....Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Wards Cove, 490 U.S. at 656 (citations omitted).

Addressing the specificity requirement of alleged discriminatory subjective practices, the Court stated:

> [Plaintiffs] will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for

> "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."

Id. at 657 (citing Watson).

A fair reading of the Wards Cove opinion reveals that the Supreme Court intended that plaintiffs identify a specific aspect of "subjective decision making" to require a showing of disparate impact. Indeed, in referring to the "objective" employment practices in Wards Cove, the Supreme Court made specific reference to various "objective" factors that were at issue, including nepotism, separate hiring channels, and rehire preference. Id. Moreover, the fact that the Court intended precise identification of disputed employment practices to satisfy the causation requirement is reflected in its language that attempts to appease any arguments that a specific causation requirement is unduly burdensome. In that respect, the Court stated: "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." Id.

The Fourth Circuit's decision in Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908 (4th Cir. 1989), is instructive on the issue of subjective decision making in the context of a disparate impact analysis. In Mallory, the plaintiffs alleged that the defendant employer's management utilized purely subjective criteria in reaching promotion decisions (e.g., promotions based on personal observation; no written policy on promotions; no posting of announcements about available positions). Mallory, 882 F.2d at 909. Analyzing the promotion claim solely under a disparate treatment model, the district judge held that the plaintiffs failed to prove that they were discrimina-

torily denied promotions. Id. On appeal, the plaintiffs alleged that the trial judge erred in failing to analyze their promotion claims under the disparate impact theory as well. Id. at 911.

In response to the promotion issue, the Fourth Circuit initially noted that "although the use of subjective criteria is relevant to a claim of racial discrimination, standing alone it does not prove a violation of either Title VII or § 1981." Id. at 910. The court then determined that the plaintiffs could not prevail under a disparate impact theory in light of Watson and Wards Cove. Specifically, the court stated:

> Wards Cove...amplifies Watson. Read together, these cases explain several principles that are pertinent to this litigation. The Court reiterated that, in order to prove a prima facie case, the complainants must compare the racial composition of the job in question and the racial composition of the qualified population in the relevant labor pool....The difficulty with the claimants' case is that the evidence does not disclose how many employees in the pool were qualified to become supervisors.
>
> The Court also explained that complainants must show more than statistical disparity; they must identify the specific employment practice that is allegedly responsible for the disparity and prove that the practice has caused exclusion of the group of which the plaintiffs are members.
>
> The deficiency in the statistical data pertaining to the number of qualified employees precludes [plaintiffs] from establishing a prima facie case of

> disparate impact. But even if such a case had been proved, they could not prevail. In [Wards Cove], the Court held that if the claimants establish a prima facie case of disparate impact with respect to the employer's practices, the claimants must prove that the proffered justification for the practice does not serve any legitimate employment goals of the employer.

Id. at 912 (citations omitted).

A similar analysis was made by the Second Circuit in Lowe v. Commack Union Free School District, 886 F.2d 1364 (2nd Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1470, 108 L.Ed.2d 608 (1990). Lowe involved a cause of action alleging age discrimination by two former teachers concerning a school district's failure to consider them for thirteen vacant teacher's positions for the 1986-87 school year. Lowe, 886 F.2d at 1366. The school district screened the candidates for the vacant positions by utilizing subjective tests. Id. at 1367. In short, the subjective criteria at issue included a single interview by two administrators, who were given wide discretion as to the substance of the interviews for evaluating candidates. Id. Indeed, the administrators were "to evaluate the candidates in terms of a rating of 'yes', or 'no.' No further evaluation of the candidates or explanation of the...evaluation was required." Id. In addition, the candidates were administered a writing test that was designed to "test [their] writing abilities, and, to a lesser extent, their substantive knowledge of educational topics." Id.

On appeal, the plaintiffs contended that their discrimination claims should have been submitted to the jury under a disparate impact theory. Id. at 1369-70. Analyzing the plaintiffs' disparate impact claim under the Wards Cove specific causation requirement, the Second

Circuit held:

> As an initial matter, we question whether [plaintiffs] adequately identified at trial the "'specific employment practice that is challenged.'" Their purported statistical proof was little more than a compilation of the results of the hiring process. Even on appeal, they seem unable to meet their burden of "'isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'"

Id. at 1370 (quoting Wards Cove).

The court continued: "Under Wards Cove and Watson, [plaintiffs] cannot satisfy the requirements of a prima facie case simply by broadly attacking as discriminatory the hiring process as a whole....Thus, the overall results of the Process, without more, do not show disparate impact." Id. at 1371 (emphasis added).

The Second Circuit's opinion unequivocally reflected that the various subjective factors at issue are subject to a showing of specific causation:

> Whether one focuses on the evaluations of candidates' interviews, the grading of the writing samples or [the administrative] formulaic use of these measures to eliminate candidates from further consideration, [plaintiffs] have not demonstrated that the challenged practice impacted disparately on members of the protected group....

Id.

Moreover, responding to plaintiffs' evidence concerning the age of candidates hired in the following school year, 1987-88, the court opined:

> The results of those hiring practices therefore do not support [plaintiffs'] suit challenging the hiring practices for the 1986-87 school year. The School District contends that [plaintiffs] did not even submit to the hiring process for the 1987-88 year. [Plaintiffs] are unable to point to any application by them, and they do not "identify[] the specific employment practice that is challenged" with respect to hiring for the 1987-88 year.

Id. at 1372 (citations omitted).

In the instant case, plaintiffs' statistical evidence, which, at most, merely alludes to certain employment practices, is identical to that proffered by the plaintiffs in Lowe. Indeed, both cases represent broadside attacks against an employer's policies without sufficiently identifying which practice they allege adversely impacts against them. The court finds that plaintiffs' statistical analysis under a disparate impact theory is fatally flawed.

Plaintiffs' citation of Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989), concerning the defendant's burden of production as set forth in Wards Cove is misplaced. In Evans, in responding to discriminatory allegations concerning a fire department's physical agility test, the court noted:

> The plaintiff had challenged the entire test, and the city put in a great deal of justificatory evidence which succeeded in justifying

> everything about the test except the scoring method. That was enough to satisfy the burden of production and shift inquiry to whether, with all the evidence in, the plaintiff proved -- since after Wards Cove it is the plaintiff that has the burden of persuasion -- that the test, because of its method of scoring, did not serve the legitimate ends of the employer but instead unreasonably excluded women.

Evans, 881 F.2d at 385.

Indeed, the Seventh Circuit noted that the trial judge may have incorrectly placed the burden of persuasion on the defendant city because the judge had opined that the city had not "justified" the cut-off score of the test in question. Id.

The defendant in the case at bar adequately justified the method and manner by which it conducted its hiring and put forth legitimate reasons totally unrelated to race for making the various changes in its practices. As such, even if this case were properly presented under the disparate impact model, defendant has satisfied its burden, and plaintiffs have failed to show that the proffered hiring practices and changes therein did not serve the legitimate ends of the employer.

The court finds that defendant's disposing of its log book, which was devoid of any references to applicants, has no bearing on the legality of its hiring processes. Plaintiffs cite EEOC v. American National Bank, 652 F.2d 1176, 1196 (4th Cir. 1981), cert, denied, 459 U.S. 923 (1982), and Lewis v. Bloomsburg Mills, 773 F.2d 561, 568 (4th Cir. 1985), for the proposition that the company's failure to abide by the EEOC regulations concerning

record-keeping requirements can lead to the drawing of adverse inferences against the company. Neither of these decisions is pertinent to the instant action. In American National, the defendant company introduced applicant-flow data for one of seven relevant years in question to rebut the plaintiff's work force statistics. American National, 652 F.2d at 1195. The employer had destroyed records from which relevant data could be obtained for the remaining six years. Id. In Lewis, the plaintiffs concentrated on the employer's hiring practices for the period September, 1963, through September, 1971. Lewis, 773 F.2d at 567. The court held that the employer could not use applicant-flow data to supplement or test the validity of the plaintiffs' raw hiring rate statistical evidence because the employer had improperly disposed of employment applications for most of the eight-year relevant time period. Id. Neither of these cases is remotely analogous to the situation at hand. In that respect, Ms. Haynes testified that applications were retained for six months and then thrown away, pursuant to an established policy. The dates denoted on the applications in Plaintiffs' Exhibits 191 and 192 confirm that the applications that were retained were for the six-month period prior to the filing of the EEOC charges in October, 1984, and thereafter.

Claims involving the formation of an employment contract can be raised under § 1981. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The viability of a discriminatory hiring claim brought pursuant to § 1981, however, depends upon whether the employer, "at the time of the formation of the contract, in fact, intentionally refused to enter into a contract with the employee on racially neutral terms." Patterson, 491 U.S. at 184 (emphasis in original).

In Patterson, the Supreme Court stated:

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer....Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under Section 1981. Cf. Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (refusal of law firm to accept associate into partnership) (Title VII).

Id. at 185-86.

In Patterson, the plaintiff, a black female, was employed as a teller and file coordinator at a credit union. Id. at 169. Plaintiff's promotion contentions under § 1981 were premised upon the credit union's failure to promote her to an intermediate accounting position. Id. In Hishon, cited in Patterson, a female attorney employed for seven years by a large Atlanta law firm was denied the opportunity to join the firm as a partner. Hishon v. King & Spalding, 467 U.S. 69, 71 (1984). In his concurring opinion in Hishon, Justice Powell recognized that promotion to partnership in a law practice concerned such matters as "participation in profits and other types of compensation; work assignments; approval of commitments in...civic or protected political activities; questions of billing;...retirement programs; and expansion policies." Hishon, 467 U.S. at 79 n.3.

In the case at bar, a change from an hourly production worker to an hourly leader's position that (1) entailed an initial 10 cent increase in pay, (2) did not

result in a change of benefits, (3) still required the employee to clock in with production workers, and 4) was merely a temporary probationary position clearly does not satisfy the court's requirement of a "new and distinct relation between the employee and the employer." Likewise, promotions to foreman involve a minor increase in pay, no change in benefits, no change from hourly status with clocking in still required, and thus would not be a "new and distinct relation."

The Fifth Circuit's decision in Harrison v. Associates Corp. of North America, 917 F.2d 195 (5th Cir. 1990), interprets the "new and distinct relation between the employee and the employer" language as set forth in Patterson. In Harrison, the Fifth Circuit noted that "[i]n determining whether a particular promotion rises to the level of a new and distinct relation between employer and employee, the court must compare the nature of the employee's current duties, compensation, and benefits and [the] duties, compensation, [and] benefits in the different position in question." Harrison, 917 F.2d at 198. The court further stated: "Although a raise which accompanies a change in position is evidence of a new and distinct relation, a raise which is accompanied by no significant change in duties and responsibilities does not reach the level of a change in employment relationship protected by § 1981." Id.

Applying the Fifth Circuit's analysis in Harrison to the instant action, it is clear that the change in position from factory worker to leader or foreman is a "routine in-house" probationary promotion that includes a menial increase in wage with no change in benefits rather than a transfer to a new job. Id. As reflected in previous discussion, the instant defendant's factory workers, leaders, and foremen are required to utilize a time clock, and individuals occupying each of these positions receive

overtime pay. Accordingly, these promotions cannot be challenged as intentional discrimination under § 1981.

A promotional system that is based upon subjective criteria is not "discriminatory per se." Page v. U.S. Industries, Inc., 726 F.2d 1038, 1046 (5th Cir. 1984).

Although the use of subjective criteria is relevant to a claim of racial discrimination, standing alone it does not prove a violation of either Title VII or § 1981. Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 910 (4th Cir. 1989).

The absence of blacks in leader or foreman positions at Douglas a Lomason is not evidence of discriminatory promotion practices. Plaintiffs must demonstrate that the defendant, in fact, discriminated in promotions on the basis of race. Hereford v. Huntsville Board of Education, 574 F.2d 268, 273 (5th Cir. 1978).

The appropriate statistical analysis for evaluating the promotion claims at issue is a comparison of qualified members of the local labor force in Bolivar County. Lewis v. NLRB, 750 F.2d 1266, 1274-75 (5th Cir. 1985); Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), vacated on other grounds, 451 U.S. 902 (1981).

In analyzing promotion claims in the instant action, the necessary comparison is to a "qualified pool of employees presumably eligible for promotion." Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 912 (4th Cir. 1989); Pouncy v. Prudential Insurance Co., 668 F.2d 795, 803 (5th Cir. 1982). The comparison of the entire Douglas & Lomason work force is not appropriate. Pouncy prohibits plaintiffs from making a "baseless" assumption that all of the employees at Douglas & Lomason are equally qualified for all positions. Pouncy,

668 F.2d at 803.

The fact that blacks turned down offers of promotion is a bona-fide defense to discriminatory promotion claims. See, e.g., Falcon v. Gen. Telephone Co., 815 F.2d 317, 321 n.6 (5th Cir. 1987).

Plaintiffs' reliance on Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), and Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), concerning subjective factors in promotion and transfer policies at issue in the instant action is misplaced. Rowe and Pettway condemn only subjective decisionmaking by white foremen of a minority employee's "ability, merit and capacity." Pettway, 494 F.2d at 231-32; Rowe, 457 F. 2d at 353, 359. In this case, it is indisputable that both black and white individuals employed in supervisory capacities recommended both black and white employees for promotions.

Claims of discrimination in selections for craft positions and temporary upgrades to rack maintenance and general maintenance do not involve a "new and distinct relation" and may not be challenged under § 1981.

C. Retaliation Claims

Prior to the Patterson decision, the Fifth Circuit held that claims of retaliation for filing EEOC charges or lawsuits challenging racial discrimination could be brought pursuant to § 1981. See Irby v. Sullivan, 737 F.2d 1418, 1430 (5th Cir. 1984); Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982). The Fifth Circuit has recently readdressed this issue. Specifically, in Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991), the court overruled Goff, holding that § 1981 "no

longer extends to retaliatory termination." Carter, 912 F.2d at 840.

The court holds that claims of retaliation for filing racial discrimination EEOC charges or lawsuits, such as the claims alleging retaliatory enforcement of the Company's garnishment rule herein, cannot be raised under § 1981. These claims are properly addressed under Title VII.

Payne v. McLemore's Wholesale and Retail Store, 654 F.2d 1130 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), establishes the correct standard for a retaliation claim. Plaintiff creates a prima facie case of retaliation by showing 1) statutorily protected expression; 2) an adverse employment action; and 3) a causal link between the protected expression and the adverse action. Id. at 1136. This causal link has been described as "causation-in-fact" or "but for" causation. See Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984).

The order and allocation of proof then becomes similar to that used in other Title VII contexts: the employer has the burden of producing or articulating a legitimate, nondiscriminatory reason for its action, after which the employee bears the ultimate burden of showing that the reasons given were a pretext for retaliation. Irby v. Sullivan, 737 F.2d 1418, 1425-26 (1984) (quoting McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983)).

In this case, plaintiffs have failed initially to establish a causal connection between the filing of the EEOC charges and the terminations of the complaining plaintiffs. Further, defendant articulated a legitimate, nondiscriminatory reason for its actions (violation of the garnishment policy), and plaintiffs were unable to show

that this reason was pretextual.

D. Hostile Environment Claims

"Work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory." Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1275 (5th Cir. 1989). Although the Fifth Circuit has considered hostile environment claims in the context of sex discrimination, it has not addressed such claims in the context of racial discrimination. The above quoted language from Wyerick, however, leads this court to conclude that the analysis used in sexual hostile environment cases applies (with some modification, of course) to the case at bar. Accordingly, to prove a claim of hostile environment, these plaintiffs must prove:

> (1) that they belong to a protected group;
>
> (2) that they were subjected to unwelcome racial harassment;
>
> (3) that the complained of harassment was based on race;
>
> (4) that the complained of harassment affected a term, condition, or privilege of employment; and
>
> (5) that the defendant employer knew or should have known of the harassment in question and failed to take prompt remedial action.

See Jones v. Flagship International, 793 F.2d 714, 719-20 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987).

Without doubt, plaintiffs have shown that they are

members of a protected class. However, for the reasons stated in this court's findings of fact, plaintiffs have presented no credible evidence to establish any of the remaining factors. Each instance of perceived mistreatment arose in the context of a reminder or an instruction, and although not always delicately handled, there is nothing in the record to suggest that these instances were anything more than isolated and work-related. In this regard, plaintiffs have therefore failed to prove that the alleged discrimination was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Jones, 793 F.2d at 719-720. Again, as previously indicated, the court finds no credible evidence of the use of racial epithets. Even if the court accepted such allegations as true, the mere utterance of a racial slur which offends the employee "does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII." Id. at 720. And finally, the evidence clearly shows that when incidents of perceived mistreatment or harassment were reported to Company officials, prompt and affirmative action was taken to remedy the situations.

E. Conclusion

Based on all of the testimony, an exhaustive examination of the voluminous documents, and the thorough argument of counsel, this court in its final analysis can reach but one conclusion: the defendant, Douglas & Lomason Company, did not in any manner or at any time discriminate against these plaintiffs because of their race.

A final judgment will be entered accordingly.

This 21st day of July, 1992.

(Signed) L.T. Senter, Jr.

CHIEF JUDGE

United States District Court

Northern District of Mississippi

CASE NUMBER: DC 85-160-S-O

DANIEL ANDERSON, JR. POITIER L. ANDERSON, MOSE EMANUEL BAILEY, MOSES COLEMAN, RICHARD GRANT, JR., EARNEST HALL, TOMMY HARDY, CHRIS SPRING HARRIS, SYNOVIA ANN JACKSON, LONNIE JENNINGS, JAMES H. LEWIS, ROBERT MELVIN, MICHAEL CHIFFON O'NEAL, BOBBIE JEAN SHARP, LINDA DIANE SHARP DAVIS, ALEXANDER SMITH, CATHERINE SPELLS, GREGORY TOWNSEND, KIMROY WILLIAMS, Individually and on behalf of all others similarly situated,

Plaintiffs

v.

DOUGLAS & LOMASON COMPANY,

ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION and LOCAL UNION NO. 212 OF THE ALUMINUM, BRICK AND GLASS WORKERS INTERNATIONAL UNION,

Defendants

Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants Douglas & Lomason Company, Aluminum, Brick and Glass Workers International Union and Local Union No. 212 of the Aluminum, Brick and Glass Workers International Union recover of the plaintiffs Daniel Anderson, Jr., Poitier L. Anderson, Mose Emanuel Bailey, Moses Coleman, Richard Grant, Jr., Earnest Hall, Tommy Hardy, Chris Spring Harris, Synovia Ann Jackson, Lonnie Jennings, James H. Lewis, Robert Melvin, Michael Chiffon O'Neal, Bobbie Jean Sharp, Linda Diane Sharp Davis, Alexander Smith, Catherine Spells, Gregory Townsend, Kimroy Williams, Individually and on behalf of all others similarly situated, their costs of action.

July 21, 1992 — NORMAN L. GILLESPIE

Date — Clerk

Marcia H. Gettys

(By) Courtroom Clerk

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0115

Daniel Anderson, Jr.
806 Jackson Street
Cleveland, MS 38732 — Charging Party

Douglas & Lomason
Highway 61, North
Cleveland, MS 38732 — Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that Respondent discriminated against him because of his race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities and treated in a discriminatory manner as an employee because of his race (Black). Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the

Charging Party's individual claim is addressed. No determination is made on class issues raised. Also no determination is made as to any other issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 7/31/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0120

Poitier Anderson
P.0. Box 174
Mound Bayou, MS 38762 Charging party

Douglas and Lomason Company
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that he and Blacks as a class were discriminated against by the Respondent with regard to hiring, promotion and other terms and conditions of employment because of their race. Examination of the evidence in the record indicates that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of her receipt of this letter

and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/21/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0086

Mose Bailey
P.0. Box 42
Shaw, MS 38773

Charging Party

Douglas & Lomason
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that Respondent discriminated against him because of his race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities and treated in a discriminatory manner as an employee because of his race (Black). Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the Charging Party's individual claim is addressed. No determination is made on class issues raised. Also no determination is made as to any other issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions,

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 8/29/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0197

Moses Coleman
P.0. Box 167
Mound Bayou, MS 38762 Charging Party

Douglas and Lomason Company
Highway 61 North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that he was discriminated against by the Respondent by not being promoted, not being hired, and in terms and conditions of employment because of his race (Black). Examination of the evidence in the record indicates that there is not reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of his receipt of this letter and by taking the other procedural steps set out in the enclosed

Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/24/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0105

Richard Grant, Jr.
204 Rudy Street
Cleveland, MS 38732 Charging Party

Douglas & Lomason Company
P.0. Box 1130
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that he and Blacks as a class are discriminated against by the Respondent with regard to promotions, hiring and other terms and conditions of employment because of their race. Examination of the evidence in the record indicates that there is not reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/24/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0693

Earnest Hall
P.0. Box 145
Gunnison, MS 38746

Charging Party

Douglas and Lomason Company, Incorporated
P.O. Box 1110
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleges that he has been discriminated against in violation of the Civil Rights Act of 1964, as amended, with regard to promotion, because of his race. Charging Party also alleges that Respondent discriminates against Blacks as a class with regard to promotions, job classification, discipline, discharge and with regard to other terms and conditions of employment because of their race. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against with respect to promotion. No determination is made with respect to class issues raised by which Charging Party is not individually aggrieved. Also no determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above within 90 days following receipt of Notice of Right to Sue and by taking the other procedural steps set out in the attached Notice of Right to Sue.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 2/11/86

Enclosures: Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0696

Chris Spring Harris
919 Pearl
Cleveland, MS 38732 Charging Party

Douglas and Lomason Company
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging party alleged that she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, with regard to being denied employment. She also alleges that the Respondent discriminates against Blacks as a class with regard to hiring and refusing to allow them to apply for employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/25/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0196

Synovia Jackson
P.0. Box 505
Cleveland, MS 38732 Charging Party

Douglas & Lomason
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge as filed under Title VII of the Civil Rights Act of 1964, as amended.

All jurisdictional requirements have been met.

Charging Party alleged she was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities because of her race (Black) and by being discharged in retaliation for filing an EEOC Charge. Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the Charging Party's individual claim is addressed. No determination is made

on class issues raised. Also no determination is made as to any other issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 9/19/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0691

Lonnie Jenkins [sic]
P.0. Box 635
Cleveland, MS 38732 Charging Party

and

Douglas & Lomason Company, Incorporated
P.0. Box 1130
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that he was discriminated against by the Respondent by not being hired because of his race (Black).

Examination of the evidence in the record indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named

above within 90 days of his receipt of this letter and by taking the other procedural steps set out in the enlcosed [sic] Notice of Right to Sue. Within one year after the date of this letter I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 3/27/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0617

James H. Lewis
1109 Searcy Street
Cleveland, MS 38732 ChargingParty

and

Douglas & Lomason Company
P.0. Box 1130
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the

Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that he was discriminated against by the Respondent by not being hired because of his race (Black). Examination of the evidence in the record indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named above within 90 days of his receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 3/29/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0119

Robert Melvin
Route 1, Box 287
Cleveland, MS 38732 Charging Party

Douglas & Lomason
Highway 61, North
Cleveland MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that Respondent discriminated against him because of his race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities and treated in a discriminatory manner as an employee because of his race (Black). Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the Charging Party's individual claim is addressed. No determination is made on class issues raised. Also no

determination is made as to any other issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 7/31/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-1109

Linda Diane Sharp
1110 Huey Street
Cleveland, MS 38732 Charging Party

Douglas and Lomason, Inc.
P.O. Box 1130
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge as filed under the Civil Rights Act of 1964, as amended.

All jurisdictional requirements have been met.

Charging Party alleged she was discriminated against because of her race in violation of the Civil Rights Act of 1964, as amended, with regard to being allowed to file an application for employment with the Respondent. Examination of the evidence in the record indicates that there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this

letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 1/21/86

Enclosures: Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0783

Michael Chiffon O'Neal
173 East Gertrude
Drew, MS 38737 Charging Party

and

Douglas and Lomason Co., Incorporated
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

By the authority vested in me by the Commission's Procedural Regulations, I issue the following determination as to the merits of the subject Title VII charge. Respondent is an employer within the meaning

of Title VII of the Civil Rights Act of 1964, as amended (Title VII), and the timeliness and all other jurisdictional requirements have been met.

Charging Party alleged he was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, with regard to being denied employment. He also alleges that the respondent discriminates against blacks as a class with regard to hiring. Examination of the evidence in the record indicates that there is no reasonable cause to believe that these allegations are true. No determination is made as to any other issue raised by or which might be construed to have been raised by the subject charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of his receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/25/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-1107

Bobbie Jean Sharp
712 Cross Street
Cleveland, Ms. 38732 Charging Party

Douglas and Lomason, Inc.
P.0. Box 1130
Cleveland, MS 38701 [sic] Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge, filed under the Civil Rights Act of 1964, as amended.

All jurisdictional requirements have been met. The Charging Party alleged that she was discriminated against by the Respondent with regard to being hired and not being allowed to file an application for employment with the Respondent because of her race (Black). Examination of the evidence in the record indicates that there is not reasonable cause to believe that these allegations are true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of this letter and by taking the other procedural steps set out in the

enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 1/21/86

Encl: (2) Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0085

Alexander Smith
610 Murphy Street
Cleveland, MS 38732 Charging Party

Douglas and Lomason, Inc.
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge as filed under the Civil Rights Act of 1964, as amended.

All jurisdictional requirements have been met.

The Charging Party alleged that Respondent discriminated against him personally in violation of Title VII of the Civil Rights Act of 1964, as amended, with regard to promotion, suspension, failure to give him an application to take to his wife and retaliation because of his race and because he filed the charge of discrimination. He also alleges that Respondent discriminates against Blacks as a class with respect to hiring, promotion, segregated job classifications and general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party's allegations concerning discrimination against him personally are true. No determination is made on class issues raised. Also no determination is made as to any other issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 9/27/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0094

Catherine Spells
151 S. Union Street
Drew, MS 38737 Charging Party

Douglas & Lomason
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

Charging Party alleged that Respondent discriminated against her because of her race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities and treated in a discriminatory manner as an employee because of her race (Black). Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the Charging Party's individual claim is addressed. No determination is made on class issues raised. Also no determination is made as to any other

issue raised by or which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 8/29/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-1038

Gregory Townsend
151 S. Union Street
Drew, MS 38737 Charging Party

Douglas and Lomason Company
P.0. Box 1130
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that he was discriminated against by the Respondent by not being allowed to submit an application nor hired because of his race (Black). Examination of the evidence in the record indicates that there is not reasonable cause to believe that these allegations are ture. [sic] No determination is made as to any other issues which might be construed as having been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of his receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after

the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 6/24/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

Jackson Area Office
Equal Employment Opportunity Commission
Federal Office Building
100 West Capitol St., Suite 721
Jackson, Mississippi 39289

Charge No. 044-85-0107

Kimroy Williams
1101 Lincoln Avenue
Cleveland, MS 38732 Charging Party

Douglas & Lomason
Highway 61, North
Cleveland, MS 38732 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge as filed under Title VII of the Civil Rights Act of 1964, as amended and the timeliness and all other jurisdictional requirements have been met.

Charging Party alleged that Respondent discriminated against him because of his race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, by being denied promotional opportunities and treated in a discriminatory manner as an employee because of his race (Black). Charging Party also alleges that Respondent discriminates against Blacks as a class with respect to promotion to supervisory and craft and maintenance positions, maintaining segregated job classifications, discipline, hiring and in general terms and conditions of employment. Examination of the evidence in the record indicates that there is not reasonable cause to believe that Charging Party has been discriminated against. Only the Charging Party's individual claim is addressed. No determination ia made on class issues raised. Alsc no determination is made as to any other issue raised by or

which might be construed to have been raised by this charge.

This dismissal concludes the Commission's processing of this charge. Should the Charging Party wish to pursue this matter further, the Party may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days following receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue. Within one year after the date of this letter, I intend to destroy the case file in accordance with the Commission's records disposition instructions.

On behalf of the Commission:
/s/
Henrene Matthews, Area Director

Dated: 9/30/85

Enclosures: (2)
Notice of Right to Sue
Copy of the Charge

UNITED STATES COURT OF APPEALS
FIFTH COURT

No. 92-7554

DANIEL ANDERSON, JR., ET AL.,
Plaintiffs-Appellants,

versus

DOUGLAS & LOMASON COMPANY, ET AL.,
Defendants,

DOUGLAS & LOMASON COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(September 9, 1994)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6/23/94, 5 Cir. 1994, 26 F.3d 1277)

Before JOHNSON, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

We, however, vacate the following language found in the majority opinion at 26 F.3d 1288:

> ["We do not have the statistical expertise to declare a particular statistical technique inappropriate where a qualified expert expresses a contrary view and the district court credits the testimony." *Id.*; *see also Trevino*, 811 F.2d at 904 (holding that the district court did not err in crediting the defendant's statistical evidence over contrary evidence); *Nash*, 800 F.2d at 497 (noting that we must affirm the district court's finding where there are two permissible views of the evidence). Thus,]

ENTERED FOR THE COURT:

Emilio M. Garza

United States Circuit Judge

FILED
JAN 12 1995
OFFICE OF THE CLERK

No. 94-1027

In The

Supreme Court of the United States

October Term, 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioners,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

George K. McPherson, Jr.
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Attorneys for Respondent

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the "clearly erroneous standard" in its review of the district court's decision?

2. Did the lower courts correctly apply the standards of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), in determining that a pattern and practice case such as this should proceed under a disparate treatment theory?

3. Is it appropriate for the lower courts to consider and favor a statistical analysis which accurately reflects the dynamics of the Company's hiring; and is it appropriate for the lower courts, and especially the trial court to rely on reasonable inferences from the record evidence?

RULE 29.1 LISTING

Douglas & Lomason Company has no parent or subsidiary companies. It is engaged with the Japanese company Namba Press in a joint venture known as Bloomington-Normal Seating Company, Normal, Illinois.

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III. THERE IS NO SPLIT AMONG THE CIRCUITS NOR A CONFLICT WITH THIS COURT'S OPINIONS ON THE PROPER EVALUATION OF STATISTICAL EVIDENCE OR THE TRIER-OF-FACT'S RESORT TO INFERENCES FROM THE RECORD EVIDENCE. 13

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No. 94-1027

In The

Supreme Court of the United States

October Term, 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioners,

v.

DOUGLAS & LOMASON CO., INC.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Respondent, Douglas & Lomason Co., Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 26 F.3d 1277 (5th Cir. 1994).

STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

STATEMENT OF THE CASE

The course of this litigation now has covered nearly ten (10) years. The original complaint was filed on July 5, 1985. Class certification hearings were held in July and September 1986. Plaintiffs' Motion for a Preliminary Injunction was heard and denied in October 1986 and a modified motion similarly was denied in January 1987 and again by supplemental order in March 1987. The trial court's denial of a preliminary injunction was affirmed by the Fifth Circuit in August 1988. *Anderson v. Douglas & Lomason Company*, 835 F.2d 128 (5th Cir. 1988).

A subsequent lawsuit entitled *Bishop, et al. v. Douglas & Lomason Company*, Case No. DC-87-85-5-0, was filed on behalf of non-applicants and was later merged into *Anderson*.

A subsequent Motion for Preliminary Injunction on matters unrelated to the original motion was heard and granted in part in April 1987.

The trial of the case to the Honorable L. T. Senter, Chief Judge, commenced on June 5, 1989, and concluded on June 28 1989 without interruption. Judgment was entered in favor of defendant on July 21, 1992. All proceedings prior to judgment had been presided over by Judge Senter.

In the course of discovery over nearly a four-year period, the parties took some 200 depositions of anecdotal fact witnesses, as well as those of expert witnesses. The defendant Company produced all applications and related personnel documents of thousands of employees. Plaintiffs and their experts were permitted access to the Company's production facility for purposes of inspection.

The Original Complaint and its amendments in *Anderson* launched a classic broad-based pattern and practice attack on the employment practices of the Company. The claims included straightforward hiring, failure to provide applications, racial harassment, hazardous job assignments, promotions, discriminatory bathroom breaks, discriminatory allocation of sit-down jobs, assignments to temporary jobs and retaliatory discharge. Appendix 165a. These claims were tied directly to alleged animus under the tenure of Plant Manager James Grizzard, such that the time period under scrutiny is referred to throughout this case as "the Grizzard years."

Judge Senter is the only individual who was involved in every aspect of this litigation from the filing of the Complaint through issuance of his decision. Not only did he preside at trial as the trier-of-fact, he also presided at hearings on class certification and motions for preliminary injunction. In so doing, he was able to hear, observe and evaluate the testimony of witnesses, especially expert witnesses, as the case developed in pre-trial hearings as well as at trial.

Moreover, his experience in race discrimination litigation in the Northern District of Mississippi is legion. For years he has presided over litigation involving major employers in the State of Mississippi and the Mississippi State Employment Security Commission. *See e.g., Pegues v. MSES,* 899 F.2d 1449 (5th Cir. 1990); and in many of these cases the plaintiffs and plaintiff classes have been represented by the same plaintiffs' counsel involved in this litigation.

In evaluating all the evidence, Judge Senter had available to him the historical statistical context of an employer with a workforce with a minority population exceeding 70% in a community where the civilian labor force was 51.9%. At the same time, the Company demonstrated that in the critical area of separations, where racial animus should be readily apparent, "the number of black employees who left the company was significantly lower than would have been predicted under a neutral analysis, *and indeed significantly less than would have*

been predicted in a racially-discriminatory environment such as is alleged by the plaintiffs." Appendix 176a.

With this historical perspective, and with the opportunity to hear first-hand and to analyze and weigh the anecdotal evidence, Judge Senter reviewed the competing statistical presentations and concluded that the defendant's was more credible. He reviewed each of the seven standards of availability proffered by plaintiffs and rejected them. Among the reasons for this rejection was that each of the plaintiff's standards was based upon an external "stock" figure or some other percentage which was not reasonably comparable with the Company's hiring practices during "the Grizzard years." Appendix 176a-181a.

He credited the defendant's statistical analysis which was based upon actual applicant flow and which accounted for the dynamics of the actual hiring practices of the company. Appendix 174a-175a. His crediting of the defendant's analysis is supported by his factual findings of what the Company's hiring practices were during the period under scrutiny. Appendix 167a-174a.

In its decision, the Fifth Circuit affirmed the trial court's decision, and it is clear that it engaged in a critical review of the record under Rule 52. That it correctly applied the "clearly erroneous" standard in its review is patent.

SUMMARY OF THE ARGUMENT

I. The Fifth Circuit correctly applied the "clearly erroneous" standard mandated by Rule 52(a) in a manner consistent with the dictates of this Court in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1979), *Bazemore v. Friday*, 478 U.S. 385 (1986), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). As the trier-of-fact, the trial judge was uniquely capable of evaluating the evidence and his findings are fully supported in the record.

II. The lower courts correctly applied the standards of *Wards Cove Packing v. Atonio*, 490 U.S. 642 (1989). The plaintiffs in this case launched a broad-based pattern and practice disparate treatment attack upon the employer and failed to isolate a specific employment practice from this shotgun attack.

III. The lower court's analysis of the defendant's statistical evidence and acceptance of the hiring pools is not in conflict with the decisions of this court or of other circuits. That analysis was a true reflection of the dynamics of the Company's hiring practices and the disaggregated data was also analyzed on an aggregated basis.

Nor was it error for the lower courts to draw reasonable inferences from the record evidence in its evaluation of anomalies in the statistical presentations. Even beyond this, however, no dispositive findings or conclusions relied upon such inferences.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD

The Petitioners have claimed that the Court of Appeals failed to consider the entire record in its review of the decision of the District Court. This clearly is not the case. The Fifth Circuit's application of the clearly erroneous standard was fully consistent with the dictates of the Supreme Court.

What the Petitioners seek here is no different from what they sought below--to have a *de novo* review of all the evidence, thus usurping the judicial function of the trial court. As noted in *Anderson v. City of Bessemer City*, 470 U.S. 564, 473-474 (1985):

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of the district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

In a further explanation of the rationale of deference to the trial court and availability of a trial *de novo* at the appellate level, this Court went on to note in *Anderson*,

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the Court of Appeals very likely contrib-

> utes only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources. In addition, parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the "the 'main event' ... rather than a 'tryout on the road'". (Citation omitted.)

470 U.S. at 574-575.

The cases cited by Petitioners are not of a contrary view, although cited by Petitioners as such. Thus, while stating the governing principle that the entire record is to be reviewed, this Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-396 (1948), merely held that upon the special circumstances of that case, credibility resolutions by the trial court were not controlling because of the obvious conflict between the testimony of the witnesses and documentary evidence of record.

As noted above, although Petitioners cite *Anderson v. City of Bessemer City*, *supra*, as being in accord with this general principle stated in *United States Gypsum*, the full flavor of the Bessemer City case is more of a caution against overzealous appellate review which may amount to a trial *de novo*. Unfortunately, in the ardor of presenting their case, the Petitioners have chosen to ignore later clarifying pronouncements of this Court, in favor of "sound bites" taken out of context and clothed as the "holding" of this Court.

Likewise, the "holding" cited by Petitioners in *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982), was but a further caution to appellate courts not to stray from the constraints of Rule 52 by considering some facts "ultimate facts" which

thereby are independently reviewable. Stated otherwise, for purposes of Rule 52, the trial court's finding of the "fact" of discriminatory intent is not independently reviewable but subject to Rule 52. *See e.g.*, footnote 16 at 456 U.S. 286.

The principle enunciated in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274-75 (1979), is merely that "Rule 52(a) applies to expert testimony," as stated by Petitioners is not dispositive. The appropriate citation to *Graver Tank* would include the following:

> Rule 52(a) of the Federal Rules of Civil Procedure provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' To no type of case is *this last clause* more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. (Emphasis supplied.)

336 U.S. at 274. The "last clause" to which the Court refers is that of the high degree of deference accorded a trial court's credibility resolutions. Thus, according the Court, where expert testimony is involved the degree of deference accorded the trial court is at its highest.

Petitioners' citation to *Bazemore v. Friday*, 478 U.S. 385, 397-98 (1986), for the proposition that the unanimous holding was that the district court had erred in not accepting expert statistical evidence is inaccurate. Although the Court considered this question at length, the holding was as follows:

> Although we think that consideration of the evidence makes a strong case for finding the District Court's conclusion clearly erroneous, we leave that task to the Court of Appeals on

> remand which must make such a determination based on the 'entire evidence' in the record.

478 U.S. at 403-404. What was at issue in that case is whether the Plaintiffs' statistical analyses could be rejected outright as unacceptable evidence of discrimination simply because the analyses did not consider all variables. The conclusion of this Court was simply that any such defect goes to probative value and not to admissibility, with its probative value depending upon "all the evidence presented by both the plaintiff and the defendant." 478 U.S. 400.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 426-36 (1975), did not involve "an intense review of conflicting expert testimony," but instead, a review of a limited validation study by an industrial psychologist. The Court in *Albemarle Paper* questioned the probative value of a one-half day validation study, applying the EEOC Guidelines on testing as a standard of comparison.

What all these cases tell us is that the courts of appeal have a duty to review district court decisions based on all the evidence; however, such appellate review under the clearly erroneous standard does not rise to the level of *de novo* review. Moreover, in the allocation of judicial resources, Rule 52 compels deference to the trial court in its findings based in whole or in part on the credibility of witnesses.

In the case at bar, the trial judge presided over weeks of trial, which had been preceded by years of pre-trial discovery, hearings on class certification and preliminary injunctive relief, and an interlocutory appeal. Obviously, given the length of the proceedings below and the volume of the record, there is but one individual who has been in a position to evaluate all the evidence first-hand. Judge Senter did so in this case, and his decision, consisting of 140 pages, deals in great detail with all the evidence before him and his reasons for accepting or rejecting that evidence.

In its review of the district court's decision, it is obvious that the Court of Appeals necessarily had to review the entire record and that it did so. It concluded that it was not necessary to review the district court's decision not to accept the plaintiffs' external availability measures because it agreed with the district court's determination that applicant flow was the preferred measure of availability. Appendix 15a, n.14. To then have gone ahead to review that evidence would have been an exercise in futility. Beyond this decision to forego a detailed and *de novo* analysis of the record, there is no indication that any other part of the record was not considered.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN WARDS COVE PACKING CO. V. ATONIO AND THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE BURDEN TO IDENTIFY THE SPECIFIC EMPLOYMENT PRACTICE CAUSING THE ALLEGED DISPARATE IMPACT.

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-658 (1989), this Court addressed the issue in a disparate impact case of the plaintiff's burden to identify and to isolate a specific employment practice as the cause of the alleged disparity. Beginning with the earlier decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 at 994 (1988), the Court first addressed the question of causation:

> [W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged ... Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices

> that are allegedly responsible for any observed statistical disparities.

Building upon this premise, in *Wards Cove* the Court required of plaintiffs in future cases the burden to "demonstrate that it is *the application of a specific or particular employment practice that has created the disparate impact under attack*." 490 U.S. 657. The reasoning behind this requirement was the equalizing of the use of bottom-line statistical evidence.

> Just as an employer cannot avoid liability under Title VII by demonstrating that, 'at the bottom line,' his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), *see Connecticut v. Teal*, 454 U.S. 813, a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is a racial *imbalance* in the work force. (Emphasis original.)

490 U.S. 656-657.

The decisions of both lower courts in the instant case are entirely consistent with the dictates of *Watson* and *Wards Cove*, and contrary to the representation of Petitioners, there was no attribution or acknowledgment by either the district or appellate court that any "specific or particular employment practice ... created the disparate impact under attack." The claim by Petitioners that a difference in the percentage of black hires was attributed "to the company's decision not to provide application forms to persons seeking to apply at times when the company is hiring," (Petition, p. 21) is either a fabrication or a gross misreading of those decisions.

The Court of Appeals outlined the various changes in the company's hiring practices which were being challenged by the Plaintiffs, which included:

- not allowing employees to take applications home for friends and/or relatives
- requiring all applicants to appear personally at the plant to complete applications
- accepting applications only when the company was hiring
- accepting a limited number of applications for available openings
- accepting appointments to complete applications from telephone callers

Appendix 2a-4a. After noting all of these changed practices, the Court of Appeals' conclusion was not that propounded by Petitioners, but instead:

> Thus, it was possible for individuals to be told that D&L was not taking applications both when the Company was *and was not* hiring. (Emphasis supplied.)

Appendix 4a. In endorsing the district court's application of *Wards Cove*, the Court of Appeals concluded that the plaintiffs had not pointed to a specific policy other than "D&L's policy requiring individuals to fill out applications at the plant," and had failed to establish a causal connection between that policy and the alleged disparity. Appendix 9a. After a careful review of the record, and of the findings of the district court, the Court of Appeals determined that "the record contains no evidence indicating that D&L's application procedures affected potential black applicants any differently than potential white applicants." Appendix 12a. It is this ultimate finding which belies the baseless representation of the Petitioners.

What the Petitioners fail to recognize is that at no point has there been an evidentiary showing that after the changes in Company policy that blacks had a disparate opportunity to avail themselves of access to job openings. All the anecdotal

evidence was to the contrary. The courts below so found, and the record fully supports their conclusions.

Petitioners' contention that the Fifth Circuit's decision is in conflict with the Third Circuit's in *Green v. USX Corp.*, 896 F.2d 801 (3rd Cir.), *cert. denied*, 498 U.S. 814 (1990), is similarly baseless. In *Green*, the plaintiffs were able to show a disparate impact through applicant flow data *and* were able to isolate the interview process as the cause of that disparity. In the instant case, not only was there no specific policy or practice isolated, the applicant flow data established no significant statistical disparity in the hiring of blacks. Thus, although the outcome of *Green* and this case is different, each outcome was the result of the *same application* of the *Wards Cove* standard to a *different set of facts*. Such "differences" are not "conflicts" warranting review by this Court.

III. THERE IS NO SPLIT AMONG THE CIRCUITS NOR A CONFLICT WITH THIS COURT'S OPINIONS ON THE PROPER EVALUATION OF STATISTICAL EVIDENCE OR THE TRIER-OF-FACT'S RESORT TO INFERENCES FROM THE RECORD EVIDENCE.

The Respondent is in agreement with the Petitioners that this Court has charted a path for the lower courts in the proper use of statistical evidence in Title VII cases. However, Respondent strenuously disagrees with Petitioners' baseless assertions that the lower courts in this case improperly evaluated the statistical evidence. Respondent also challenges the assertion that the lower court's reliance upon inferences from the record evidence is improper.

The Petitioners' argument here is nothing more than a reiteration of their argument, rejected below, that the statistical methodology employed by the defense expert should have been rejected because it relied on samples smaller than the universe of all applicants over a two-and-a-half year period. The Court of Appeals addressed this question.

> The plaintiffs next argue that even if applicant flow analysis was the best standard by which to measure the labor pool available to D&L, the district court erred in accepting Dr. Haworth's analysis because it was based on samples too small to allow for a meaningful statistical analysis. When statistics are based on small sample sizes, the plaintiffs contend, the presence or absence of statistical significance is not a reliable indicator of discrimination. Whether or not a sample is too small to yield statistically meaningful results, however, must be determined on a case-by-case basis. *Watson*, 487 U.S. at 995, n.3, 108 S. Ct. at 2789, n.3; *Rendon v. AT&T Technologies*, 883 F.2d 388, 397 (5th Cir. 1989). The district court found Dr. Haworth's analysis to be more credible and more persuasive than the seven analyses offered by the plaintiffs' expert. We find that the district court did not err in crediting D&L's statistical analysis, which demonstrated that D&L did not engage in discriminatory hiring practices, over the analyses offered by the plaintiffs.

Appendix 19a (Vacated language omitted). It is this finding which is challenged here. Yet in making its assertions, the Petitioners conveniently omit footnote 18 which is appended to this finding:

> Assuming *arguendo*, that the pools were too small to permit meaningful statistical analysis, Dr. Haworth also analyzed the pools on an aggregate basis and found no statistically significant deviation when pool 5 was omitted. *See* note 15, *supra*. Thus, this analysis, which the district court also credited, was not based on a sample

> significantly smaller than that utilized by the plaintiffs' expert. Therefore, the district court did not clearly err in refusing to find that D&L possessed discriminatory intent with regard to its hiring practices.

Id.

Thus the Court of Appeals and the district court had available both the "pool" analysis of smaller samples and the aggregate analysis to support their findings. Even so, had the decisions below been based only upon the non-aggregated analysis, there would be no basis for a finding here of conflict with prior decisions of this Court or conflict with decisions of other circuits.

The decisions of this Court cited by Petitioners do not dictate a contrary result. Yes, they chart a path for the lower courts to follow; however, they recognize that each case will be unique.

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, *their usefulness depends on all the surrounding facts and circumstances.* (Citation omitted.) (Emphasis supplied.)

Teamsters v. United States, 431 U.S. 324.

The peculiar facts and circumstances presented in this case included the fact that the Company's hiring pattern over the extended period in question was dynamic in terms of there being significant periods of inactivity in between extremely active periods; hiring dates reflected a proximity to recent application dates; applications which were accepted were taken only at the specific times that job openings were available; applications were taken specifically for the positions then available; and, the number of applications taken each time was limited by the specific number of positions *then available*. To analyze such a dynamic process as the Petitioners would have

it done would be to ignore the reality of the process. For example, under the Petitioners' rationale, a proper statistical analysis would be to include an applicant for employment in the latter part of 1984 along with an applicant in 1982 for a position available in 1982 when clearly the 1984 applicant was not in the "pool" of applicants in 1982. The Company's analysis corrected for this inaccuracy by comparing only those applicants available for specific openings during discernible time frames. That the courts found this to be a reasonable analysis is not in conflict with the Court's directives.

Nor is the decision below in conflict with those of other circuits. *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336, n.17 (4th Cir. 1983), stands only for the proposition that in analyzing *involuntary termination decisions*, it is preferable to view such information in combined form rather than year by year. In *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 833 F.2d 1334, 1339, n.7 (9th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988), the plaintiff presented year-by-year and aggregate statistical analyses, each of which demonstrated disparity. The Ninth Circuit merely agrees with the plaintiff that the aggregated data alone is sufficient. The *Eldredge* court did note, however, that *"if a year-by-year analysis demonstrated an ever-decreasing discriminatory impact, such a result should not be ignored."* (Emphasis supplied.) *Id.*

EEOC v. American National Bank, 652 F.2d 1176, 1993, n.12, 1194 (4th Cir. 1981) is a primer on the dilemma faced by lower courts in discerning the weight and validity of statistical evidence in general, and sample size in particular. What the Fourth Circuit was faced with was allowing smaller *employers* to use as a defense that there were too few employment decisions made to sustain statistical analysis. In addressing this dilemma, the court in *American National Bank* noted:

> But, aside from the Supreme Court's general observation in *Mayor of Philadelphia* that on the very special facts there presented "the

> District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded, *id.* at 621, *we have no guidance as to how small is too small other than our own best judgment.*

652 F.2d at 1193-1194 (emphasis supplied).

Finally, in *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983), the only thing the Eleventh Circuit said was that it was improper for the district court to ignore aggregate data and it remanded on that basis. The remand was not with direction that this aggregate data was controlling:

> Therefore, we remand this case to the district court to reconsider its finding of lack of discriminatory intent in light of the aforementioned evidence, *or else articulate reasons why it will not consider such evidence.*

Id. at 1382 (emphasis supplied).

Petitioners also raise the specter of impermissible speculation by the lower courts, citing for this proposition *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974). The admonition in that case was that the *appellate court* reviewing the record should not engage in speculation based upon a cold record. The *caveat* of the Court in *Mayor of Philadelphia* is found in footnote 20, here cited in its entirety:

> We share the view expressed in the dissent that facts in a case like the instant one, 'when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them.' *Post*, at 644. That is one reason we believe that the Court of Appeals, 'with only the printed page before [it] ...,' erred in reversing the District court. The judge most 'familiar with the context in which [the facts] occurred ...' was

> obviously the District Judge, since he heard and viewed the testimony and other evidence presented. Nothing in our opinion should be seen as detracting from the salutary principle that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances. *E.g., White v. Regester*, 412 U.S. 755, 769-770 (1973).

Id. at 621, fn.20.

In the case at bar, the Court of Appeals accepted the district court's firsthand view of the evidence, which was fully supportive of its inference from that evidence. Moreover, there is no evidence in either of the decisions below that the trial court or the reviewing court made dispositive rulings from these inferences. Rather than the *sine qua non*, at most, the inferences were noted as an additional basis for findings or conclusions.

CONCLUSION

There is nothing in the record of this case or in the review of similar cases of the courts of appeal which even remotely suggests a basis for review by this Court. The Petition for Writ of Certiorari should be denied.

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